# Selected Revenue Decisions of Kumaun

BY

TARA DATT GAIROLA

*Advocate*

*With a Foreword*

BY

SIR DIGBY DRAKE-BROCKMAN, KT., C.S.I., I.C.S.


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# FOREWORD

THE area which goes by the name of a village in the hill tracts of Kumaun is an ill-defined tract consisting of measured land, in which some of the inhabitants have proprietory rights and on which such persons pay land revenue and unmeasured land which is the exclusive property of the State. There are no village maps as such, only the culturable area having been surveyed, the boundaries of the lands which are deemed or claimed to be appurtenant to a "village" being only described and not defined, except in those few areas where there has also been a boundary survey. Much of the land under cultivation is cultivated by those who hold proprietory right, called *hissedars*; but some is in the occupation of *khaikars*, a sort of under-proprietor or superior tenant whose rights vary, and some in the occupation of *sirtans* (or tenants-at-will) and rent-free grantees of various sorts. In their relations with the occupiers, the *hissedars* are at present governed by the Kumaun Tenancy Rules of 1918; in their relations with the State they are governed by the United Provinces Land Revenue Act of 1901 as modified for the hill tracts of Kumaun, and the "Nayabad and Waste Grant Rules." The last have been several times amended, the most recent rules being those of 1934 [G. O. no. 612/XIV—312(24), dated August 1, 1934]. Both sets of rules have been passed under section 6 of the Scheduled Districts Act (XIV of 1874). Under the Land Revenue Act, the Board have powers of reference, revision and review except in matters relating to revision of records and settlement in which they have powers of appeal under rule 22 of the Kumaun Rules of 1922. They also have powers of revision under the Tenancy Rules, but not under the present Nayabad and Waste Grant Rules. The Commissioner of Kumaun has always been the highest appellate authority in Kumaun for most matters. It has long been recognized that the Tenancy and other Laws relating to land tenure in Kumaun have been in a highly unsatisfactory state the determination of disputes depending largely on local custom. In the decision of cases, Stowell's Manual has long been the accepted book of reference; and it is a mine of useful information. It is now, however, an old volume; and while

the Board's rulings on the various points that have arisen have been few owing to their limited powers of appeal, rulings of the Commissioners of Kumaun have been numerous, since that volume was first published. As a first step towards elaborating and consolidating the law relating to these matters in Kumaun, Mr. L. Owen, lately Deputy Commissioner in charge of Kumaun, who replaced the Commissioner in 1933, took steps to have a collection made of the more important rulings of previous Commissioners of Kumaun and entrusted the work to the able hands of Rai Bahadur Pandit Tara Datt Gairola, Advocate, who in due course has made such a collection and has now asked me as member of the Board who has been in charge of the appellate and revisional work of the Kumaun Division and takes interest in the matter to write a Foreword to his collection.

The decisions of various Commissioners have never been published though some of them contain adjudications on important points of law and custom ; and the work of making a selection from them has not been rendered any easier by the fact that many of them are so abbreviated that the importance of the point at issue cannot always be easily appreciated. I have perused the collection with interest and consider that Pandit Tara Datt Gairola has performed his task with skill and thoroughness. He has divided up the rulings under the various subjects to which they relate and has added a commentary on each head. The opinions expressed by Pandit Tara Datt in the abstracts and commentary must necessarily be accepted as his own ; but with this qualification, it can be said that all his remarks are characterized by shrewdness and a wide grasp of the laws and customs of Kumaun, and will form a useful supplement to our knowledge of the conditions of land tenure in Kumaun. That this volume will prove of wide use to both revenue courts and legal practitioners practising in Kumaun or having to deal with its affairs I have no doubt; and I commend it to their notice. In conclusion I would like to thank the Pandit for the performance of a very useful public service; and to congratulate him on the authorship of a well documented and profoundly interesting volume.

D. L. DRAKE-BROCKMAN.

*Dated July* 11, 1936.

# PREFACE

IT is a great anomaly that, while the revenue laws of the plains districts of the United Provinces were codified long ago and have been amended from time to time to suit varying agricultural conditions, the land revenue and the tenancy laws of the Non-Regulation districts of the Kumaun Division, which differ from the plains in material points, have remained uncodified: the decisions of the Commissioner of Kumaun and the Board of Revenue being the only laws of the land. Government decided in 1914 to draft the Kumaun Revenue and Tenancy Bills and appointed a committe, known as Stowell Committee, for the purpose. The committee drafted three Bills and submitted them to Government; but the Government shelved those Bills for reasons not known.

In 1932-33 four Bills were introduced by Government in the United Provinces Legislative Council relating to Kumaun: two of them being the Kumaun Tenancy Bill and Kumaun Land Revenue Bill. After some discussion in the Council and outside it those Bills too shared the same fate.

The discussions revealed a great divergence of opinion on some of the vital principles of the land tenures in Kumaun. The decisions of the various courts given at different times are sometimes conflicting; and in some cases it is difficult to reconcile them and deduce legal principles from them, without studying the whole history of the case law, extending over a period of over a century.

It is a matter of surprise that no attempt has so far been made either by Government or by any private agency to collect and publish the revenue decisions of Kumaun courts. In deciding cases, the courts have to be guided by the settlement reports and Mr. Stowell's Manual of Land Tenures.

Mr. Stowell's vast experience of Kumaun; wide outlook and grasp of legal principles entitle his book to be an authority on the subject; and though several portions of the book, which was written about 32 years ago, have now become obsolete; and some of the rulings cited in it are no longer

good law, the principles enunciated by Mr. Stowell still hold good.

I have been collecting decisions of the Kumaun courts for over 25 years. I showed my notes to Mr. L. Owen, C.I.E., I.C.S., the then Deputy Commissioner in charge Kumaun Division in 1934, who seemed keenly interested in the subject and advised me to collect more decisions and publish them in a book form. He very kindly gave me permission to inspect his court files and take notes from them. I was also granted permission by Mr. Coghill, I.C.S., Deputy Commissioner, Garhwal, to inspect the files in his Record Room and take copies of decisions. The result of my labour is embodied in the following pages of this book.

The book has been divided into three parts. Part I contains an Index of the case law; Part II full reports of Revenue decisions; and Part III commentary.

It is hoped the book will prove of use to the courts administering revenue justice in Kumaun and to lawyers and the litigant public of Kumaun. It may also help the legislature in codifying the revenue and tenancy laws of Kumaun.

In conclusion I wish to thank Sir D. L. Drake-Brockman, KT. C.S I., C.I.E., Senior Member, Board of Revenue, Mr. L. Owen, C.I.E., I.C.S., former Deputy Commissioner in charge, Kumaun Division, Mr. D. J. K. Coghill, I.C S., Deputy Commissioner, Garhwal, and Mr. Ibbotson, M.C., O.B.E., C.I.E., I.C.S., Deputy Commissioner in charge, Kumaun Division, for their encouragement and help in the preparation of this book. I also thank my nephew Pandit Deva Nand Gairola, Advocate, for sending me some old revenue decisions from the Commissioner's Record Room, Naini Tal.

I also acknowledge the work done by my nephew Pandit Kali Prasad Gairola and my clerk Pandit Keshaba Nand Uniyal in sorting and typing the material of this book. They have worked very hard and with much intelligence and ability, thereby enabling me to finish the work in about three months.

TARA DATT GAIROLA.

PAURI GARHWAL:
*December* 1, 1935.

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# PART II
## Full Reports of Decisions.

### CHAPTER I—Village Boundaries

IN THE COURT OF P. WYNDHAM, Esq., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated January 19, 1918*

MISCELLANEOUS REVENUE APPEAL NO. 11 OF 1917–18

Pancham Singh, Narain Singh and Autar Singh, of Malla Silla, patti Mawalsyun, pargana Chondkot, Garhwal .. *Appellants*,

*versus*

Dewan Singh and others of Talla Silla, Patti Mawalsyun, Garhwal ... ... ... ... *Respondents*.

Appeal against order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated October 24, 1917.

*Claim*—Village boundary.

Village boundary disputes under section 41, Land Revenue Act.

*Held* by Mr. Wyndham, Commissioner, that village boundary disputes lie under section 41, Land Revenue Act, and that they should be decided on the basis of existing survey maps.

ORDER

This is a boundary case under section 41 of the Revenue Act. The *hissedars* of Malla Silla applied to the Sub-divisional Officer for pacca pillars to be erected to define the boundary between their *Sal Assi* lands and those of the village of Talla Silla.

The Sub-divisional Officer, Lansdowne, and the Deputy Commissioner have made a local inspection and the boundary has been fixed by them.

The case is made quite clear by the order and map (included in the order) of the Deputy Commissioner, dated October 14, 1917.

This order is the subject of this appeal.

For the purpose of this case the only portion of the landscape to be considered is that portion which lies on the left bank of the Sigod river and extending from there up to the watershed the big ridge called the Hargarh ridge going downstream we have first Malla Silla and then Talla Silla. The lands of each extend from the stream (Sigod river) up to the crest of the Hargarh ridge. The *Sal Assi* boundaries describe the boundary between these two villages as the "Lambidhar." Now the word "Lambidhar" means long spur and in the landscape before us there are two long spurs which go from Hargarh ridge down to the Sigod

stream. These are shown in the map of the Deputy Commissioner to be X A B and X D C.

Talla Silla says X A B –Lambidhar.

Malla Silla says X D C—Lambidhar.

The two courts below have found that X A B is the Lambidhar and have found in favour of Talla Silla.

In this finding they are supported by actual physical possession. The fields marked "cultivated fields" situated between the two spurs are admittedly Talla Silla fields and were held so in 1850 and were restored to Talla Silla after dispossession in 1860.

The Malla Silla people say that the waste lands above this should not be affected thereby.

But if, as is clear in the case, the boundary is the long spur "Lambidhar" and the cultivated fields are in talla Silla then A B must be Lambidhar and A B its extension up to X where it joins the main ridge must be the boundary and the jungle and waste must belong to Talla Silla.

I see no reason to interfere on appeal. This appeal is dismissed with costs.

P. WYNDHAM,

*Commissioner, Kumaun Division.*

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PETITION NO. 19 OF 1918–19

*Copy of Board's order passed in the case of* PANCHAM SINGH, *etc., applicants*, versus DIWAN SINGH, *etc. respondents, mauza Talla Silla, patti Mawalsyun, pargana Chaodkot, district Garhwal.*

Application for revision of the order of the Commissioner, Kumaun Division, dated January 19, 1918, in the case of village boundary.

*Held* by Mr. H. M. R. Hopkins, Junior Member, Board of Revenue, on May 28, 1918, that village boundary disputes lie under section 41, Land Revenue Act, and that they should be decided on the basis of existing survey maps.

ORDER

These were proceedings under section 41 of the Land Revenue Act, which provided that disputes as regards boundaries shall be decided, as far as possible, on the basis of existing map of 1891–92, clearly show that the land claimed by the appellant falls outside the boundary of his village of Malla Silla. The appellant admits this but claims that the survey was wrong but this plea cannot be entertained. The application fails and is dismissed.

H. M. R. HOPKINS,

*Junior Member.*

*May* 28, 1918.

## IN THE COURT OF P. WYNDHAM, Esq., I.C.S., C.I.E., O.B.E., COMMISSIONER, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 18 OF 1920-21

Sri Ram, Badri Datt, Hans Ram and others of village Madanpur, patti Langoor, district Garhwal ... *Appellants,*

*versus*

Tula Ram, Jiwa Nand, Kishan Datt and others of village Dhulgaon, patti Langoor, district Garhwal ... *Respondents.*

Appeal against order of P. Mason, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 16, 1920.

*Held* by Mr. Wyndham, Commissioner, that *San Assi* boundaries cannot be decided on mere application to revenue courts, nor does section 41, Land Revenue Act, apply to unassessed waste lands. In all boundary suits the plaintiff should ask for user rights over the waste lands, included within his *Sal* 80 boundary and for injunction in a revenue court under Nayabad Rules.

ORDER

Heard parties on the 20th and today.

The plaintiff in this suit went to the Sub-divisional Officer and on annas 8 stamp asked that the boundaries between Dhulgaon and Madanpur be fixed according to the *San Assi* boundary of Mr. Traill, Bengal Civil Service (1822). The Deputy Collector put on an amin to do so. The amin goes to the spot, lays down what he calls *San Assi* boundary and reports. The Deputy Collector accepts the report and sanctions pillars.

In due course there is an appeal. Subsequent maps, viz. Beckett's maps of 1863 and the survey map of 1895 are produced and the Deputy Commissioner orders the proceedings to be cancelled and the boundary pillars to be destroyed.

This case comes to me on second appeal. I uphold the Deputy Commissioner's order. We cannot upset existing things in this way, or lightly lay down boundaries defined indefinite and about 100 years ago. As *San Assi* boundaries are in every person's mouth at present, it is rather important to state what the position of this land, the subject of the suit is, in detail.

Plaintiff village is Madanpur and defendant village is Dhulgaon.

Madanpur asks to have the boundary laid down showing its village waste lands as they were defined by Mr. Traill in *San Assi* 1882 Fasli.

The land which they wish to have demarcated is not measured and assessed, but is village waste "Civil Jungle" i.e., protected Kumaun Forest under notification no. 869F/638—44, of October 17, 1893, Chapter IV, Act VII of 8878, which declared all such lands protected forests.

Section 41 of the Revenue Act tells the Revenue staff how to define and settle boundaries; but this would apply to land assessed to revenue and not to protected forest.

If the plaintiff village is dissatisfied with the present boundaries as understood between itself and the defendant village it can sue for a right of easement, i.e. to exercise user of forest rights over such portion of the waste land which they assert ought to be within their boundary under the demarcation of Mr. Traill in A.D. 1822. They have rights of user only and should therefore ask for an injunction restraining defendants from exercising specific or all rights of user if they dispute such exercise.

That would be a suit relating to unmeasured and unassessed land and would be filed in the revenue courts under no. 1190/1/627, dated June 30, 1916, section 14.

This seems the correct procedure in these nebulous *San Assi* claims and no amin should be lightly deputed as has been done in this case. In this case the claimant should be directed to file his own map showing his *San Assi* 1822 boundary along with his plaint and the opposite side can file their map.

The plaintiff can also be directed to state in detail what right of user he claims.

It will thus be for the court to decide what rights of user the plaintiff has established and over what tract of ground and give a decree accordingly.

This decree will of course only be binding as between parties. This appeal is dismissed with costs.

P. WYNDHAM,
*Commissioner, Kumaun Division.*

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S.,
COMMISSIONER, KUMAUN DIVISION

*Dated June 9, 1927*

MISCELLANEOUS REVENUE APPEAL NO. 31 of 1926-27

Pancham Singh, Durga Singh and others of mauza Koligaon, patti Ghurdarsyun, district Garhwal ... *Applicants,*

*versus*

Jeet Singh, Pramod Singh and others of Haluni ... *Respondents-Defendants.*

Appeal against order and decree of Captain A. W. Ibbotson, I.C.S., Deputy Commissioner, Garhwal, dated November 11, 1926.

Claim for declaration of right of *user* in respect of Poparpani jungle for *gauchar*, etc.

*Held* by Mr. Stiffe, Commissioner, that *Sal* 80 boundaries prevail over the boundary of *Sal* 96, when the latter is vague and uncertain.

ORDER

This is in fact a suit for the determination of the *Sal Assi* boundary of Koligaon and Haluni. Both the courts have found that the land in

dispute is in Haluni. The original *Sal Assi* description is reasonably clear, and gives the land to Haluni. There after in 1896 there was a determination by a *panchayat*, the record of which has been put in, including a copy of a sketch map. The two courts below have differred as to the meaning of the decision of the *panchayat*, the lower court holding that it gives the land to Koligaon, the lower appellate court holding that it gives the land to Haluni. Personally I find both the map and *panchayatnama* entirely unintelligible and the only thing that I can see to do with an unintelligible judgments is to disregard it, and to go back to the firm ground of the *Sal Assi* description. According to this the land goes to Haluni to defendants-respondents. The deductions to be made from this fact are correctly taken by the lower court, and I dismiss the appeal with costs.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S.,
COMMISSIONER, KUMAUN DIVISION

*Dated June* 10, 1927

MISCELLANEOUS REVENUE APPEAL NO. 37 OF 1926-27

Buthar Singh, of mauza Jalgaon, patti Ranigarh, district Garhwal ... ... ... ... *Appellants-Defendants,*

*versus*

Gaur Singh and others, of mauza Sunak, patti Ranigarh, district Garhwal ... ... ... *Respondents-Plaintiffs.*

Appeal against order and decree of Lala Prem Lal Sah, Additional Deputy Commissioner, Garhwal, dated January 20, 1927.

Claim for declaration of right for *gauchar*.

*Held* by Mr. Stiffe, Commissioner, that the waste land which lay within the *Sal Assi* boundaries of one village, but were recorded within another village in Beckett's and Pauw's settlements belong to the former village and not to the latter village

ORDER

Sunak village sues certain members of Jalgaon village for a declaration of right of *gauchar* in a particular plot of land in which the Jalgaon people have some *jinswar*. The position is curious. *Sal Assi* boundary has been carefully verified by kanungo as well as by amin; and it happens in this particular case that the parties agree on the old marks some of which are temples, still existing, and the boundary is clear. There is no doubt that the lower courts were right in holding the suit land to lie in Sunak village according to the *Sal Assi* boundary. On the other hand at Pauw's settlement such *jinswar* as there was is shown and

recorded in Jalgaon; and so far as could be seen from the copy of Beckett's time, we have only a sketch of the ridge on which to form this opinion. As to Pauw's opinion, there is no doubt, there is thus a conflict between revenue papers and the *Sal Assi* boundary papers. The whole litigation rests on G. O. no. 416 of June 16, 1915, and G. O. no. 1190 of June 30, 1916, and I find that in these Government Orders there is no reference to the Settlement papers, but to the boundaries as defined in the year 1880 Sambat, I therefore feel bound to follow the *Sal Assi* boundary, consequence is that we have the Jalgaon people trying to cultivate land in the *Sal Assi* of Sunak, and the Sunak people have perfect right to object and to get the declaration for which they ask. I therefore dismiss the appeal with costs. This order governs appeals nos. 38 and 39 of 1926-27.

N. C. STIFFE,

*June* 10, 1927. *Commissioner, Kumaun Division.*

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PETITION NO. 13 OF 1930-31.

*Copy of Board's order passed in the case of* BAIJ RAM, *etc. of village Kaudla, applicants* versus TARA DATT, *etc., respondents, mauza Kandghera Idwalsyun, district Garhwal.*

Application for revision of the order of the Commissioner of Kumaun Division, dated March 26, 1931, in case of claim for declaration of rights and possession.

*Held* by E. F. Oppenheim, Esq., Junior Member, Board of Revenue, on October 3, 1931, that the cause of action in suit for declaration of *Sal Assi* boundary and *gauchar* rights begins from the date on which such rights were first denied, when plaintiff's application for extension was first refused and that Article 14, L. A., applies to such suits.

ORDER

Baij Ram and his two brothers, who are applicants before me brought a suit for a declaration that they were entitled to certain land which, they claimed, is situated in their village Kaudla. Their claim was resisted by the opposite party, who said that the land was situated within their village Kandghera. The Assistant Collector and the Deputy Commissioner went into the case with care and came to concurrent findings that the land was within the boundaries of Kaudla and gave the applicants the declaration for which they had asked. The Commissioner considers that the right to sue had accrued in 1909 and that in consequence the suit of the applicants was time-barred.

This application for revision is based on the contention that the finding of the Commissioner that the right to sue accrued in 1909 was wrong.

I have examined the records of the 1909 case. What happened then was that the opposite party objected to Baij Ram cultivating this land. Baij Ram claimed that the land was within his village and that he was

entitled to cultivate it. The Assistant Collector considered that the dispute was really a dispute about boundaries. He believed the contention of the opposite-party. Baij Ram was ordered to vacate the land on the ground that he had cultivated it without permission. An appeal to the Deputy Commissioner was dismissed. Baij Ram was prohibited from cultivating this land.

It is unnecessary in this connection to go into the litigation of 1927, which is alleged by Baij Ram to have furnished the cause of action in this case. The question now is the question whether the litigation of 1909 must be considered to be litigation which gave Baij Ram a definite right to sue at the time and whether he has now lost this by virtue of the law of limitation.

There was certainly a definite denial of title in that year. The question then in dispute was exactly the same question as that now in dispute. In consequence the Commissioner was right in holding that Baij Ram had only the time given to him by law in which to sue and not an indefinite time.

It is claimed by the applicant that the law in 1909 about the cultivation of this land was different from the law in force after 1911. I do not think that this consideration affects the case. Under both systems of law preferential treatment was given to cultivators of the village in which the land was situated. If the courts in 1909 had found that this land was situated in the village of Baij Ram he would presumably have been allowed to continue to cultivate it.

It is also claimed that the addition of the two brothers of Baij Ram, as plaintiffs in the present case gave new rights. There is nothing in this contention, which was rightly rejected by the Commissioner.

It is also claimed that the order of 1909 was not binding on the other co-sharers of Kaudla and that therefore, they would be entitled to sue for a declaration in regard to their rights. This is perfectly correct.

But in the present case the only people interested are Baij Ram, and his brothers. The other co-sharers were not plaintiffs originally and are not interested in the case. The suit which was brought originally by Baij Ram and his brothers alone should have been dismissed on the ground that their right to sue had ceased to exist.

For these reasons the application is dismissed. The applicant will pay costs and Rs.20 pleader's fee.

E. F. OPPENHEIM,
*Junior Member.*

*October* 3, 1931.

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IN THE COURT OF L. M. STUBBS, ESQ., O.S.I., O.I.E., I.C.S.,
COMMISSIONER, KUMAUN DIVISION

*Dated August* 25, 1935

MISCELLANEOUS REVENUE APPEAL NO. 28 OF 1932-33

*Instituted on* 20-12-1932

Appeal against the decree and order of W. F. G. Browne, ESQ., I.C.S., Deputy Commissioner, Garhwal, dated 10-11-1932.

Sher Singh, Alam Singh, and others of mauza Kurkuti, Malla Painkhanda, Garhwal ... *Appellants-Plaintiffs,*

*versus*

Ratan Singh, Man Singh and others of mauza Malari, Malla Painkhanda, Garhwal ... *Respondents-Defendants.*

Claim for declaration of right over certain Toks, regarding boundaries, under Kumaun Rules.

*Held* by Mr. Stubbs, Commissioner, that the Sal 80 boundaries are not sacrosanct, and that if they have been modified by subsequent decisions or settlements, the boundaries so modified are the correct boundaries of the villages concerned.

ORDER.

I have heard this case on two dates and at great length. The main argument for the respondents is that the Sal 80 boundaries are sacrosanct, that they cannot be varied and that they are easily ascertainable.

According to the San Assi boundaries which the Deputy Commissioner has accepted, Kurkuti would not have any area at all. This can be seen from the two maps prepared by the Settlement office.

A mere glance at the maps will show the difficulty of the situation.

Clearly there was something wrong about the San Assi boundaries and they have from time to time been corrected. They were corrected by Colonel Batten in 1837 (the 1896 boundary). They were again corrected by Colonel Grastin in 1871 after reference to Mr. Beckett.

The reference to Colonel Beckett is not exact but the judgment shows that Colonel Grastin asked him question and he replied he had corrected the boundaries, he did not know what form his correction took, but the logical deduction is that he corrected it in accordance with Colonel Batten's findings. Even now the A.R.O. has corrected the boundaries in accordance with possession. Colonel Batten's order of 1837 is the most important matter in this case. He decided the boundaries of the 2 villages and obtained the signatures of the representatives of both. A reference to his settlement report page 101 shows his method in these cases and I cannot see why this should not be accepted. If the San Assi decision was wrong it was corrected.

We have now to see how far Colonel Batten's boundries are intelligible. On this there has been a good deal of argument and the Deputy Commissioner has found that the amin's report which is based on these boundaries is imaginary. This I fail to see. We have Hundesh as one boundary, the Yong Gadhera as another and the Ghriti river as another.

The Hundesh boundary is simple enough, it is the Tibetan border. The Yong Gadhera most obviously must be the Gadhera which runs by Yong which is shown in the survey map.

The Hundesh boundary up to Dapa must be up to the point where the road to Dapa leaves British territory. Otherwise Dapa has certainly no meaning as it is a Bhote market some way from the border.

The only question in doubt is the whereabouts of the Kiroli Khoma which is an intermediate point showing the line between Yong Gadhera and the Hundesh boundary. Kiroli Khoma means a clump of Kiroli trees obviously a very movable feature as there must be many such clumps in the area. When the line was fixed there was probably a well-known Kiroli clump on that line. Since then the trees may have been cut or may have died and the other party would certainly claim any similar clump on any site which suited their purpose. I have another case today in which two marks are a porcupine's earth and a barking deer's ravine both equally variable.

The facts of the case are undoubtedly that when the San Assi boundaries were given they were necessarily vague. The area was on the very edge of British India and was largely unexplored. In 1837 there was a much more careful survey and the boundaries were much more clearly defined. It is obviously desirable that a decision arrived at by the officer who was definitely examining the matter and who had bound the parties to the agreement would be accepted rather than a rough decision which has been continually departed from, partly owing to the necessities of the case and partly owing to its orginal faultiness.

I allow the appeal therefore and restore the order of the first court Pandit L. D. Joshi. Costs against respondents.

L. M. STUBBS,

*August* 25, 1937. *Commissioner, Kumaun Division.*

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PETITION NO. 5 OF 1933-34

*Copy of Board's order passed in the case of* RATAN SINGH, *applicant* versus SHER SINGH, *etc. respondent, mauza Malari, district Garhwal*

Application for revision from the order of the Commissioner of Kumaun Division, dated August 25, 1933, in a case of declaration of right.

*Held* by Mr. Drake-Brockman, Junior Member, Board of Revenue, that no revision lies to the Board of Revenue under the Nayabad Rules of 1931. Held further that the decisions of Settlement courts in boundary disputes are binding on Revenue courts.

ORDER

In the course of survey and record operations the Assistant Record Officer fixed the boundary between the villages Kurkuti and Malari along a certain line. The people of Kurkuti appealed against this finding to the Record and Settlement Officer who upheld the order of the Assistant Record Officer. The people of Kurkuti therefore filed a suit against the people of Malari. Their plaint does not disclose under what rule or law they bring it. Only a reference is given at the top of the plaint to the Nayabad, in which matters in Kumaun are generally involved. The confusion is not improved by the fact that while the number of the notification as given is that of the new Nayabad Rules.

The plaint describes the suit as one to set aside the Record Officer's order defining the boundary as running along a certain line and for the removal of the boundary pillars based thereon; as a result of which decision they have been deprived of rights in a large area of benap land and for a permanent injunction to restrain the people of Kurkuti from using the land in suit for purpose of grazing, etc.

The suit presumably must fall under section 36 of the Nayabad Rules as it seeks to establish claim in benap land. The preliminary point is again taken in this case that the Board have no revisionary power in suit, under section 36. This objection has been upheld in Madho Singh *versus* Prem Ballabh Belwal, etc. heard on the same day and must be upheld in this case also. The application for revision therefore must be dismissed. There are some special features in this case, however, which comment notice. The Assistant Record Officer passed an order against which an appeal was preferred to the Record Officer. A suit relating to the same matter which was in issue in the proceedings before the Assistant Record Officer, is then filed in the court of Assistant Collector, from whose decision an appeal lies to the Deputy Commissioner. The Deputy Commissioner is the same person as the Record Officer and hears the appeal. The peculiarity of the situation seems to have struck him but not the learned Commissioner. It may be safely said that nowhere in these provinces outside Kumaun would such a thing happen. I have no doubt that the Deputy Commissioner was as impartial in appeal as he could be. But I suggest that he would have been well advised to apply to the Commissioner for transfer of the appeal in the suit.

Secondly nobody seems to have noticed the point that special procedure is provided for Assistant Record Officers and Record Officers. I refer to rule 22, Chapter V of the Kumaun Rules and orders relating to Kumaun Division. This rule and rule 23 with the schedule attached thereto have obviously nothing to do with partitions imperfect or perfect, but they are found for some unaccountable reason in Chapter V which is headed a procedure in imperfect partitions. It is evident that against the orders of a Record Officer a third appeal lies to the Board. This being so and no appeal having been preferred, the order of the Record Officer became final.

Even had the people of Kurkuti appealed to the Board they would not be precluded from bringing a suit in the proper court, but the frame of their suit is obviously wrong. They could not have asked even a civil court to set aside the order of the Assistant Record Officer except on the ground of lack of jurisdiction, and it is obvious that he has jurisdiction. Nor would they, so far as I can see, ask a Revenue court to issue an injunction against the people of Malari from exercising the right of grazing, etc. in the land in suit. The most they could have done was to establish a claim to grazing rights, etc. in the disputed area and then if they thought it necessary and desirable to ask the revenue authorities to amend the boundary line between the two villages in accordance with the decision in the suit.

Had the people of Kurkuti appealed to the Commissioner and the Board and lost their appeal and then brought a case the situation would have been somewhat poignant for the appeal in that case would have *lain* to the Commissioner and his order would have been final under the Nayabad Rules and had he held in favour of the people of Kurkuti, he would have had to upset the orders of the Board.

This is a particularly good instance if any more is needed of the Gilbartian situation in which litigation in Kumaun finds itself today as a result of the welter of confusing acts and rules under which administration has to be conducted. However things must be taken as they are and I can only hope that efforts will be made in the near future to get the tangle cleared and suggest to the learned counsel who appeared in these cases to assist in and in any manner they can in the process. The application is accordingly dismissed. The parties may bear their own costs.

DECREE.

Parties should here bear their own costs, and it is further ordered that the costs incurred by the parties in the lower courts be paid and borne by them as entered in the decree of those courts.

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## IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 21, 1934

MISCELLANEOUS REVENUE APPEAL NO. 121 OF 1932-33

Tek Ram and others, mauza Purkot, patti Talla Katyur, district Almora ... .. *Appellants-Defendants,*

*versus*

Joga Singh and Pan Singh, Gusain Singh, village Gwar, patti Talla Katyur, Almora ... *Respondents-Plaintiffs.*

Claim for declaration of right and recovery of possession of land and claim for the land within their boundary, under Kumaun Rules.

*Held* by Mr. Owen, Commissioner, that where a village has been declared as having a separate entity by a Settlement Officer, the boundaries found by the Settlement Officer must be accepted as the boundaries of the new village; and that the Sal 80 boundaries are affected thereby, the modifications made by the Settlement Officer is binding on all Revenue courts; and that in a case of conflict the Settlement boundaries override Sal Assi boundaries.

ORDER

This appeal raises an interesting question of Kumaun law which has apparently not been settled in any of the courts.

The facts as stated in the lower appellate courts order are that Purkot village applied for certain land on their border by way of a Nayabad grant. The Gwar villagers objected that the land lay within their boundary. The usual boundary suit was filed and the court of first instance found that the land in suit actually did lie within the boundaries of Gwar village, but decided that as the village was only created in 1873 and had no Sal Assi boundaries, it could not get a decree. The point of law only was argued in the lower appellate courts which held on a broad interpretation of rule 33 (*c*) of the Nayabad Rules that a separate village is entitled to bring such a suit. It therefore decreed that the boundary should be as defined by the court of the Assistant Collector.

With regard to the boundary itself there are therefore two concurrent findings of fact and I do not propose to reconsider these findings. I deal, however, with the point of law. Sal Assi boundaries were formed in the year 1823 or thereabouts and in Kumaun have always been accepted as the final authority as to the boundaries of any particular village. But it must be remembered that in those days Almora was still very backward with a population that was much smaller and with waste and forest lands which were more extensive. In the century that has elapsed since then much land has been brought under cultivation and new villages have been formed and their separate entities accepted by different Settlement Officers. A rigid observance of the Sal Assi rule would imply that no such new villages could ever be formed or that if they were formed they would never have any rights. It would suggest that no change was ever possible in Kumaun. But as new land is brought under cultivation it happens from time to time that new villages are formed. It may even happen that such a new village will become infinitely more important than the old parent village. Is its growth to be strangled by the fact that it was not in existence in 1823? I would hold that where a village has been recognized as having a separate entity by a Settlement Officer that the boundaries as defined by that Settlement Officer must be accepted as the boundaries of the new village, and that if the Sal Assi boundaries are affected thereby then the modification implied by the orders of the Settlement Officer is binding on all Revenue courts. In short I hold that Sal Assi boundaries are only permanent in a comparative sense and that the Settlement boundaries override the Sal Assi boundaries in a case of conflict.

In this case Gwar village has been recognized as a separate village by a Settlement Officer and has in fact had a separate existance for sixty years.

I, therefore, agree with the lower appellate court that the villagers were entitled to bring a suit. The appeal is dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March 23, 1934*

MISCELLANEOUS REVENUE APPEAL NO. 23 OF 1933-34

(*Instituted on November 9, 1933*)

Appeal against the decree and order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated September 2, 1933.

Sidwa and others of village Kapuri ka-lagga Ghorgar, patti Palla Kamsiyar, Almora ... *Appellants-Plaintiffs,*

*versus*

Lacham Singh and others of mauza Gunoli Jhuroli and Nain Singh and others of mauza Bhade, patti Palla Kamsiyar, district Almora *Respondents-Defendants.*

Claim for boundary to the effect that the western boundary of plaintiffs' village was Dumaulaghati under Kumaun Rules.

*Held* by Mr. Owen, Commissioner, that in boundary dispute cases the third court of the Commissioner is not entitled to hear arguments in appeal which seeks to impugn the two concurrent findings of fact of the lower courts as regards boundaries.

ORDER

This appeal arises out of the type of suits that is now very common in the Almora District. Two villages, Bhaden and Garholi claimed Nayabad grants in a certain area which they claimed to be within their boundaries. The usual boundary suit was filed under section 41, Land Revenue Act, rule 33, Nayabad Rules, and the then Deputy Commissioner held that both villages were entitled to a share in the land. A third village Kapuri has now come forward with a boundary suit which involves the same area. The question which is the true boundary depends on the interpretation of the San Assi and chaknamas of the villages concerned, and this in turn involves a local inspection. Both the lower courts have "agreed" as to the location of the boundary. I am now asked to reconsider this matter in appeal and have in fact heard all the arguments with care and have examined the map.

But there appears to me to be little doubt that this court is not entitled to hear arguments in an appeal which bears solely on two concurrent findings of fact. It is argued that the interpretation of a document is a legal matter in which there should be a second appeal. I agree that the interpretation of a document may and often does involve arguments that are purely legal in character and in such cases a second appeal must lie. But the interpretation of the San Assi and chaknamas involves no question of law at all. Nor can it from its very nature. The questions that arise are purely questions of fact: whether such and such a ridge is the ridge mentioned, whether a ravine is at A or B and so forth. There is and can be no interpretation of law involved in questions of this sort.

I would therefore hold that in this and in similar cases no appeal lies. The appeal is therefore dismissed with costs.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated August* 17, 1934

MISCELLANEOUS REVENUE APPEAL NO. 66 OF 1933-34

(*Instituted on February* 13, 1934)

Appeal against the order and decree of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated January 10, 1934.

Shiv Prasad, Bhola Datt and others of Kyark, Idwalsyun, Garhwal ... ... *Appellants-Defendants,*

*versus*

Pandit Tara Datt Gairola and others of village Siroli, Idwalsyun, Garhwal ... ... *Respondents-Plaintiffs.*

Claim for declaration of exclusive rights of usar over some land.

*Held* by Mr. Owen, Commissioner, that in the absence of clear proof of Sal 80 boundaries, the maps of Mr. Pauw and Captain, Ibbotson should be accepted as correct; and that no revenue officer has a right to change the boundaries by a purely executive order in Panchayat Forest Procedure.

ORDER

The land in suit lies on the borders of Kyark and Siroli villages and when the Kyark communal forest was being established this land was included in it. The Siroli villagers thereupon filed a suit presumably under rule 36 of the Nayabad Rules for a declaration that they had easementary rights in this land. They also pleaded, though this was not apparently an integral part of their suit, that the land lay within their village. In some muddled way which I do not pretend to understand this suit for a declaration of easementary rights ended up as a boundary suit and it is on this question of boundary that the appeal mainly hinges.

It is quite impossible to decide any boundary suit properly unless a map is produced showing the two villages with those portions of their boundaries which are already accepted. The map I have been referred to shows the land in dispute and nothing more excepting two paths AD and CB both of which run from east to west. The path CB is supposed to be the eastern boundary of Siroli, an obvious impossibility. It might be the northern or southern boundary but it cannot be either eastern or western.

After going through the judgments I conclude that there is some doubt as to whether this land was included in Siroli village or not in the Sal Assi and that there is no doubt that it was so included in Mr. Pauw's settlement and also in Captain Ibbotson's settlement. There is and must be a presumption that the settlement records are correct. In this case two successive Settlement Officers have recorded the land as being in Siroli and it would require altogether exceptionally strong evidence to show that these records were incorrect. I do not find such evidence in this case and I therefore accept the lower appellate court's finding as correct.

A second point has been raised in appeal. It is pointed out that the Commissioner had sanctioned the establishment of a communal forest for Kyark in this area and it is argued that under rule 7 of the Panchayat Forest Rules that disposes of the whole question, as the order cannot be questioned in civil or revenue court. Rule 7 is subject, however, to the provision of rule 5, which lays down that a dispute about a Sal Assi boundary cannot be settled summarily by the Panchayat Forest Officer acting with a Deputy Commissioner's powers, but that his decision is subject to modification as the result of proceedings in a revenue court. There are obvious reasons why boundaries cannot be changed by any summary proceedings; and I would hold that the term Sal Assi boundaries in this rule includes boundaries fixed by subsequent Settlement Officers. In the new Nayabad Rules the term " Sal Assi " having been found technically deficient has been amended to " Sal Assi or other defined or recognized boundaries ", and there is no doubt that this is intended. No revenue officer has a right to change boundaries by a purely executive order, and in communal forest proceedings, where one village can prove that the order establishing a forest has resulted in an encroachment on its boundary, it is entitled to get that encroachment removed.

The appeal is dismissed with costs.

L. OWEN,
*Deputy Commissionre in charge,*
*Kumaun Division.*

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PETITION NO. 9 *of* 1934-35

*Copy of Board's order passed in the case of* SHIV PRASAD, *applicant* versus TARA DATT GAIROLA, *respondent, district Garhwal*

Application for revision from the order of the Deputy Commissionor in charge, Kumaun Division, dated August 17, 1934, in a case of boundary.

*Held* by Mr. Drake-Brockman, Senior Member, Board of Revenue, that there can be no revision in suits under rule 36 of the Nayabad Rules of 1931. *Held* further that rule 5 of Panchayat Forest Rules expressly makes the summary decisions of boundary disputes by the Panchayat Forest Officer subject to proper decisions in regular suit, Such suits are covered by rule 36 of the Nayabad Rules and cannot be under the Land Revenue Act.

ORDER

I admitted this application to hearing as it was not clear as to what kind of suit was involved. Briefly the facts are that the Panchayat Forest Officer in virtue of the powers vested in him by rule 5 of the Kumaun Panchayat Forest Rules summarily decided that the Sal Assi boundary ran in such a way as to leave the land now in dispute within the boundaries of the village Kyark. Rule 5 expressly makes such summary decisions subject to proper determination by formal suit. The aggrieved party who took objection before the Panchayat Forest Officer regarding the inclusion of the land in suit within the boundaries of Kyark and their treatment as communal forest of that village have filed a suit. The question is under what rule such a suit falls. The only rule which seems to cover such a suit is rule 36 of the Nayabad Rules of 1931. The words "to establish a claim to any right in benap or Kaisari-i-Hind land" seem to cover such a suit as this and are wide enough to cover such a suit. At any rate the suit does not fall under the Land Revenue Act of the Kumaun Rules relating to revenue courts

It is urged that the suit contemplated by section 5 of the Panchayat Forest Rules must be confined to a determination of the Sal Assi boundary and that there has been no such determination of the boundary. The Deputy Commissioner, whose appeal was upheld held that the land in dispute "belonged to Siroli village." When you say that certain lands belong to one village it must mean that they are included within the boundaries of that village. In a district with a *hadbast* survey effect would be given to a judicial decision by altering the conterminous boundary of the villages effected. There are no *hadbast* maps in Kumaun but such a judicial decision must necessarily mean that the Sal Assi boundary as described in the document which contains the descriptive of village boundaries is subject to the interpretation now put upon it by the decision of the court at the particular point in dispute. In other words in effect there is a decision as to how the conterminous boundary of these two villages run. The argument appears to me to be without substance

The Board have judicially held that they have no jurisdiction in revision in suits under section 36 of the Nayabad Rules of 1931. The application is accordingly dismissed with costs and Rs.10 pleader's fees.

D. L. DRAKE-BROCKMAN,

*May* 13, 1935. *Senior Member.*

## CHAPTER II—Waste Lands

### IN THE COURT OF THE COMMISSIONER, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 5 OF 1908-09

Chandra Singh Negi, Jagat Singh, Kundan Singh, Udai Singh, Sheru, Uttam Singh, Gobardhan, Shri Ram, Jitaru, Fatu Bag Singh, Jawar Singh, of mauza Bhitai Patti Nandalsyun ... ... ... *Appellants,*

*versus*

Gulabu, Kedar, Indre Singh, Gumani, Rikhwa, Ghotu, Natha and Sher Singh of the same village ... *Respondents.*

Appeal against order of Mr. H. G. Walton, Deputy Commissioner, Garhwal District, dated November 16, 1908.

*Claim*—Partition.

*Held* by Mr. Winter, Commissioner, that gaon sanjait land which is used as pasture and is not cultivated should not be partitioned.

ORDER

The land in dispute is gaon sanjait and used as pasture and is not cultivated. I agree that this cannot be partitioned and I dismiss the appeal.

E. F. L. WINTER,
*Commissioner.*

*March* 15, 1909.

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### IN THE COURT OF P. WYNDHAM, ESQ., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated September* 21, 1916

SPECIAL CIVIL APPEAL NO. 29 OF 1916

(1) Pancham Singh, (2) Bala Singh, (3) Krit Ram, (4) Rup Ram, (5) Buthar, (6) Gopi, (7) Bakhtawar, (8) Nanda Singh, (9) Gumani, (10) Indru, (11) Baga, (12) Bahadur Singh, (13) Sher Singh (14) Jitu, and (15) Panchu, Panch *khaikarr* of mauza Sila Talla, patti Mawalsyun, Garhwal ... ... ... *Appellants-Plaintiffs,*

*versus*

(1) Dewan Singh, son of Jawahar Singh, and (2) Jhagar Singh, son of Ganga Ram, of mauza Gajera, Patti Ringwarsyun ... ... ... *Respondents-Defendants.*

Appeal against order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal District, dated May 27, 1916.

*Held* by Mr. Wyndham, Commissioner, that *khaikars* in a lagga village have no right to cut trees in a forest preserved by the *hissedars* living in the Asl village.

ORDER

This is a second appeal.

The facts are well set out by the lower courts. The plaintiffs-appellants are *khaikars* in the lagga village, the defendant-respondents are hissedars. The village in suit is a lagga village.

There is a piece of privately protected jungle in this village and the plaintiffs-appellants claim all customary rights of user in this jungle as against the *hissedars*. Two courts below have found that this right of user is very limited and have limited it to a right to dry and fallen wood only.

Against this finding of fact no second appeal can lie. It is also urged that under recent rules of lands all villagers have rights to the forests left out of reservation. This is not so. The recent rules only say that villages can continue to exercise the rights of user they had before and it does not give them additional rights of user against rival claimants.

This appeal is dismissed with costs.

P. WYNDHAM,

*September* 21, 1916. *Commissioner.*

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IN THE COURT OF P. WYNDHAM, ESQ., O.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION,

*Dated September* 25, 1918

MISCELLANEOUS REVENUE APPEAL NO. 33 OF 1917-18

Deba Nanad, Govind Ram, Hari Ram and others, of mauza Ratura, patti Bichla Chandpur, district Garhwal ... ... *Appellants-Defendants,*

*versus*

Mukand Ram and 12 others, of mauza Chulakote, patti Bichla Chandpur, district Garhwal .. ... ... *Respondents-Plaintiffs.*

Appeal against the order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated March 25, 1918.

Claim for declaration of right of *gaucher*.

*Held* by Mr Wyndham, Commissioner, that internal rights of cultivation are superior to external rights of *gaucher*.

ORDER

Heard parties.

This is a rule 14 case.

The Deputy Commissioner has found that settlement papers give respondents right of grazing in the waste lands of appellants. This is clear from settlement papers and cannot be disputed. Their right of grazing does not extend to a prohibition of extension of cultivation by the appellants' village and I presume courts will never be inclined to prevent extension of cultivation, by villagers in their own village because villagers in a neighbouring village have a right of grazing over their waste lands.

Home cultivation has priority of outside grazing.

This appeal must stand dismissed.

I make no order as to costs.

P. WYNDHAM,

*Commissioner, Kumaun Division.*

*September* 25, 1918.

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## BOARD OF REVENUE, UNITED PROVINCES

*Present*: MR. BURN, *Senior Member*, AND MR. PEARSON, *Junior Member*

*Mauza Simri, pargana Saindhar, district Garhwal*

PETITION NO. 8 OF 1921-22

(*Decided on July* 15, 1922)

Rabi Datt ... ... ... *Applicant*,

*versus*

Chandra Mani ... ... *Respondent-Opposite party.*

Application for revision from the order, dated December 19, 1921, of the Commissioner, Kumaun Division, in a case of Nayabad grant.

*Held* by the Board of Revenue that, where there are strong objections in the village to encroachments on the grazing ground, Nayabad grants should not be allowed and the second appellate court cannot go into the question of fact as regards grazing rights provided in section 100(1), C. P. C.

### ORDER

MR. BURN, *Senior Member*: This is an application for revision under rule 26 of the Kumaun Rules. The question in dispute is whether a Nayabad grant shall be maintained. A suit was brought under rule 14 of the Nayabad Rules of June 30, 1916. The objection to the grant is that the land is claimed to be part of the grazing ground in the village and that a path leads through it by which cattle go to water. The Assistant Collector found that the suit land was part of the village *gauchar* but that the grant had not seriously affected facilities for grazing, that the villagers had grazing rights within reserved forests also. The map shows that the land in suit adjoins certain measured lands of the defendant. The Assistant Collector also found that there was a footpath for men through the land in suit but that there was no settlement path or old cattle path. He, therefore, dismissed the suit and maintained the grant on condition that the track crossing the land was kept open.

In appeal the Deputy Commissioner found that there were strong objections in the village to encroachments on the grazing ground. He, therefore, reversed the order of the lower court and ordered that the land should remain *gauchar*.

A second appeal was filed to the Commissioner. His judgment does not reproduce accurately the reasons on which the Deputy Commissioner passed his finding. The main question was whether the land which both courts found to be *gauchar* should be allowed to be cultivated or not. It is a question of fact whether the grazing ground is sufficient. I would hold that this was a question which the Commissioner was not entitled to go into in view of rule 24 of the Kumaun Rules which gives a right of second appeal only on the grounds laid down in section 100 (1) of the Code of Civil Procedure. The finding of the Deputy Commissioner is supported by evidence and there appears to be no illegality or irregularity in his proceedings. I would, therefore, accept the appeal and restore the order of the Deputy Commissioner with costs.

MR. PEARSON, *Junior Member*: I agree.

Appeal allowed.

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IN THE COURT OF P. WYNDHAM, ESQ., O.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated July* 19, 1923

MISCELLANEOUS REVENUE APPEAL NO. 5 OF 1922-23

Ram Singh, Lal Singh and others, of mauza Syalgon, patti Langoor Palla, district Garhwal *Appellants-Defendants,*

*versus*

Nain Singh, Ratan Singh and others, of mauza Pali, patti Langoor Palla, district Garhwal ... *Respondents-Plaintiffs.*

Appeal against order and decree of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated October 6, 1922.

Claim for declaration of right of using Kaisar-i-Hind land within the boundaries of Syalgaon Malla for *gauchar*, grass and wood.

*Held* by Mr. Wyndham, Commissioner, that when an outside village has proved its rights of user in the parent village the former is entitled to exercise general rights of grazing, etc. in the latter; but it cannot interfere with its rights of extension and Nayabad grants in that village.

ORDER

Heard parties.

This is a second appeal in a suit under rule 14, Nayabad Rules.

The *hissedars* of mauza Syalgaon (defendants) are alleged to have preserved a certain block of Kaiser-i-Hind land for the purpose of a plantation within their own village boundary.

The *hissedars* of Pali (plaintiffs) assert they have rights to grazing, grass cutting and firewood within the boundary of mauza Syalgaon and bring a suit to establish a right of user over these alleged village preserves.

Two issues are struck :

1. Have defendants any preserve which the plaintiffs are not entitled to use ?

2. Have plaintiffs the right to use the plots in suit for *gaucher*, wood and grass ?

The first court finds on issue 1, the defendants have no preserve as they have no walled enclosure and have obtained no lands under the Communal Forest Rules; and on issue 2 it finds that over the Kaiser-i-Hind lands in suit the plaintiffs have a right of grazing, grass cutting and wood.

The second court upholds these findings.

This case has been tried as if these village waste lands were used for nothing but grazing, grass cutting and wood (which means in forest language firewood as distinguished from building timber for the surrounding villages).

These lands are, however, subject to other burdens, e.g., the parent village in this case. Defendants have a right to extend cultivation. They have a right as *hissedars* to ask for a Nayabad grant from Government for cultivation. Plantation, or afforestation, or other purposes, this should have been brought out when issues were fixed.

The issues would have been better framed as under :

1. Have the *hissedars* of Pali a general right of use for grazing, grass cutting and wood (firewood) over the civil forest and Kaiser-i-Hind lands of village Syalgaon ?

2. Have the defendants *hissedars* of mauza Syalgaon preserved for afforestation purposes the area in suit ?

3. Has this preservation for afforestation purposes so seriously interfered with the hissedars of Pali rights of grazing, grass cutting and firewood that in equity it should not be permitted ?

The first issue is one of fact and the two courts have come to a finding in favour of the plaintiffs. On second appeal it is not for me to interfere in such a finding; but I must say that a mere *ex parte* entry in the halatgaon of the plaintiffs' village is not enough to convince me they have any right in the defendants' village unless the halatgaon of defendants' village supports this entry. I would have been inclined to exact a good deal of other proof of actual user before accepting this claim.

The second issue is also an issue of fact and I must again accept the findings of the lower courts and hold that the defendants have not as yet established a preserve or plantation. The fact is that the land is Kaiser-i-Hind and has not been taken. It, however, is quite open to them to ask for a grant.

The third issue does not arise. I would, however, only remark on this that the general rule in Kumaun Government Forests is to permit of closure to all rights by Government of one-sixth of its reserve area at a time for regeneration purposes and some such rule could be equitably applied for reafforestation of village waste.

The respondents are entitled to a decree for a general right of user for grazing grass, cutting and collection of firewood (dry fallen wood) over the protected forests and Kaiser-i-Hind lands of mauza Syalgaon but this should not be allowed to interfere with an equitable with an exercise in future by the appellants' hissedars of their undoubted right to extend cultivation or to obtain Nayabad grants for cultivation and afforestation and/or other purposes.

The result is that the order of the appellate court is modified accordingly. The costs of this appeal are on parties.

P. WYNDHAM,

*Commissioner, Kumaun Division.*

*July* 19, 1923.

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IN THE COURT OF P. WYNDHAM, ESQ., O.B.E., O.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated November* 7, 1923

MISCELLANEOUS REVENUE APPEAL NO. 32 OF 1921-22

Kalam Singh and others of mauza Gahar, patti Chalansyun, district Garhwal ... *Appellants-Plaintiffs,*

*versus*

Naru, Naitra Singh, and others of mauza Sweet, patti same ... ... ... *Respondents-Defendants.*

Appeal against order and decree of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated August 10, 1923.

Claim for declaration of exclusive rights of *gauchar*, fuel, grass, etc., in the waste land of mauza Gahar and for an injunction restraining respondents-defendants from exercising such rights.

*Held* by Mr. Wyndham, Commissioner, that the *ex parte* entry in the halatgaon of one village, that it has rights of user in another village is not sufficient to prove such rights unless there is a corresponding entry of those rights in the servient village.

ORDER.

This is a second appeal in section 14 of the Nayabad Rules Revenue case.

The villagers of Gahar have asked for an injunction restraining the villagers of Sweet from grazing within their boundary; and the sole point to be determined is whether the Sweet people have a prescriptive right of grazing, grass and other forest rights over the waste land of this village (Gahar).

The onus of proof of such rights ought to be on the people of Sweet.

The people of Sweet and Gauchar have produced oral evidence, which the courts consider of doubtful value; the courts have however taken an

entry in the halatgaon of Sweet recorded by the Settlement Officer, Mr, Pauw, where the Sweet people in an *ex parte* proceeding in their own village papers assert they have the easement.

Now this entry was never made after a contest and enquiry as between these two villages and is of little value to prove that this right has been exercised and admitted. It certainly cannot be accepted as evidence sufficient to throw the burden of proof on Gahar. Had it occurred in the halatgaon of Gahar it would certainly have so operated against Gahar, but it does not occur in Gahar halatgaon.

We have to look at any further proof that the Sweet people can produce.

We find that in file no. 45 of 1896 certain persons of Sweet asked for 500 nalis (25 acres) of unmeasured Gahar and Shrikot land for cultivation. This was objected to by Gahar, Sweet and Shrikot villagers jointly on the ground that their villages all exercised rights of grazing on this area and this was recognized.

As regards the portion of 25 acres which lies in Gahar it is clear that the Gahar people have no case, as they admitted the Sweet hissadars as co-objectors to its being used for cultivation.

The Sweet people have produced no further evidence of their having a right through this large village of Gahar, some 1 square mile or more in area and they must be confined to the land over which they can prove they have been admitted to these easements.

I accordingly modify the order of the lower courts and grant the people of Gahar an injunction against the people of Sweet from exercising all forest rights of grazing, wood, etc. over the whole of Gahar village lands with the exception of that portion of Gahar village lands which were dealt with by the file no. 45 of '896.

I put costs on parties in all courts.

P. WYNDHAM,
*Commissioner, Kumaun Division.*

*November* 7, 1923.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S.,
COMMISSIONER, KUMAUN DIVISION

*Dated August* 6, 1927

MISCELLANEOUS REVENUE APPEAL NO. 28 OF 1926-27.

Lal Singh and others of mauza Mandar, patti Farak, district Almora ... ... *Appellants-Plaintiffs,*

*versus*

Udai Singh and others of mauza Banjh, patti same ... ... ... ... *Respondents-Defendants.*

Appeal against order and decree of H. Ruttledge, Esq., I.C.S., Deputy Commissioner, Almora, dated October 29, 1926.

Claim for declaration of gaucher and panghat rights.

*Held* by Mr. Stiffe, Commissioner, that one village may have rights of user within another village but such rights do not prevent the servient village from bringing it under cultivation or applying for Nayabad grant in such land.

ORDER

The villagers of Mandar sue the villagers of Banj for a declaration that they have exclusive rights over the land in suit and that the Banj villagers are not allowed to graze their cattle there or use the *panghat*. The oral evidence is small but the inspection by the Deputy Collector is exhaustive and conclusive. It is clear to my mind that the villagers of Banjh always have used this land as *gaucher*. The trial courts show that they have no other *gaucher*. I therefore agree with both the lower courts in refusing the declaration asked for but I would add a rider in accordance with several recent judgments of this court, that the right of Banjh to graze in this village in which they are not hissedars cannot be held to over-ride the rights of the owners of the village to extend cultivation or apply for and receive Nayabad grants. The appeal is therefore dismissed with costs. This rider merely draws attention to the existing state of the law.

N. C. STIFFE,

*Judge, Kumaun High Court.*

*August* 6, 1927.

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PETITION NO. 22 OF 1926-27

*Copy of Board's order passed in the case of* HAR SINGH, *etc. applicants*, versus JAMAN SINGH, *etc., respondents, mauza Balikhet, pargana Rangor Gangoli, district Almora*

Application for revision of the order of the Commissioner, Kumaun Division, dated April 9, 1927, in the case of declaration of right.

*Held* by Mr. Oakden, Junior Member, Board of Revenue, that article 14, Limitation Act, applies to a suit to set aside a Nayabad grant.

ORDER

Appellants sued for a declaration that they had rights of *gauchar* and *panghat* over a portion of a Nayabad grant. Their claim was decreed by the two first courts but was dismissed by the Commissioner in second appeal.

They urge that the Commissioner was not entitled to take up the question of limitation because it was not raised in first appeal, that the finding of the two first courts regarding fraud were final and that the Commissioner had wrongly held the suit to be barred by limitation.

The first point was based on a misunderstanding. The question of limitation was raised in first appeal, *vide* paragraph 5 but the Deputy Commissioner mistakingly stated that it was not raised and refused to discuss it. In these circumstances the Commissioner could either decide the point himself or return the case to the Deputy Commissioner for a finding. He chose the first alternative and his action was quite and regular.

The Deputy Commissioner recorded no finding on the question of fraud, probably because it was closely connected with the question of limitation. Consequently there were no concurrent findings of two courts on this point and the Commissioner exercised a lawful jurisdiction in dealing with the matter.

The third point urged is that the limitation is governed by article 120 of the Indian Limitation Act and not by article 14 as held by the Commissioner.

Article 14 relates to suits to set aside an act or order of an officer of Government and prescribes one year as the period of limitation and article 120 is a general provision and prescribes six years.

Appellants urge that their suit was for a declaration of right and not for setting aside or modifying the Nayabad grant.

Their plea is technically correct but overlooks the fact that a decree in their favour would nullify the grant. The suit was virtually one to set aside the grant, the real question being whether the Assistant Commissioner was right in making it. Its nature cannot be altered by clothing it as a declaration suit. Consequently the Commissioner was right in holding that article 14 applied that the suit was barred by limitation.

Application dismissed with costs. Pleader's fee Rs.20

R. OAKDEN,
*Junior Member.*

*October* 12, 1927.

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PETITION NO. 15 OF 1927-28

*Copy of Board's order passed in the case of* BALDEO, *etc., applicants,* versus DEWAN SINGH, *etc., respondents, mauza Dharkot, pargana Kapolsyun, district Garhwal*

Application for revision of the order of the Commissioner of Kumaun Division, dated December 5, 1927 in the case of declaration of *gauchar* and *panghat* rights.

*Held* by Mr. McNair, Junior Member, Board of Revenue, that a suit for declaration of right on the basis of a jinswar entry, is governed by article 120, Limitation Act and not by article 14, as in the case of Nayabad grant, there being no definite order of an executive officer in such cases.

ORDER

In this application for revision the question of limitation crops up which is certainly a point of law. While it is clear that in the case of Nayabad grant the result of a definite order of the Commissioner after proclamation and consideration of objections, a suit to set aside that order must be brought within one year, in the present case the difference is that there is no order such as the above, but a jinswar entry on the basis of which the cultivation was extended; and I do not consider that article 14 should apply to such cases; but article 120. In the latter case the period of limitation is six years, not one year, and this suit should succeed as regards nos. 914 and 916. I cannot accept the application of the applicant to deal with no 1026, which was in the original plaint given in terms of its old number, because no objection was taken before the Commissioner and the applicant accepted his finding that no. 1026 was not in the plaint. Further as a result of that finding a suit was filed separately as regards it. As I said above this suit for declaration of right over nos. 914 and 916 is within time under article 120, as there was no definite act or order of a Government officer which would bring it within article 14. The Assistant Collector himself describes the transaction as a surreptitious one and it would be dangerous to restrict the period of limitation to one year under article 14 in such cases where the entry might remain for one year and then cultivation carried out in the second year and the objector be robbed altogether of a remedy.

On this point I would allow the application for revision and as regards nos. 914 and 916 would uphold the Deputy Commissioner's decision. Half cost of applicant on respondent. Pleader's fee Rs 10.

A. W. McNAIR,
*Junior Member.*

*October* 12, 1928.

I AGREE

A. W. PIM,
*Senior Member.*

*October* 17, 1928.

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IN THE COURT OF THE COMMISSIONER, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 29 OF 1930-31

*Instituted on February* 23, 1931

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, district Garhwal.

Banchu, Sadri and others of village Melgaon, patti Talain, district Garhwal ... ... *Appellants-Applicants,*

*versus*

Mahabir Singh Pratap Singh, Sher Singh and others of the same village ... ... *Respondents-Objectors.*

Claim for Nayabad grant of 13/4/16 nalis of land.

*Held* by Mr. Stiffe, Commissioner, that the fact of improper occupation or even occupation without order should not be an absolute bar to a Nayabad grant but that the grounds on which the previous orders were made should be taken into consideration.

ORDER

The facts of this case are perfectly simple. In 1901 the Bith hissedars of the village shifted the houses of the Doms to the present site and allowed land for the purpose. These Doms have occupied a few nalis of land near and between the actual houses for the usual gardens of bananas and other fruit trees. They have once at least been told to evacuate the land, but they have not done so. They have apparently been in effective possession for about 10 years and now to regularize their position they applied for a Nayabad grant of these gardens The Deputy Commissioner's order is technically perfectly correct according to present practice that one ought not to condone the illegal occupations of land by granting a Nayabad. I have not before me the records which will show the reasons given by the court or courts for ordering evacuation; but it certainly seems as if those orders were unnecessarily severe. From the fact that the Doms have been allowed by the hissedars to remain in possession it is clear that no damage was done to the hissedars. In fact I look on them as peculiarly foolish to oppose this application, instead of making things as easy as they can for their tenants. The only grievances of the hissedars argued before me are (1) that the land is or may be wanted for building more houses for Doms; (2) that it is gauchar. Two mutual destructive pleas. It is clear that the objection is made purely on the ground which we all realize. Under the circumstances I quash the Deputy Commissioner's order and allow the grant.

I should like to add that I have lately had to consider a great many cases in which this general principle is involved of refusing summarily any grant of land which has been improperly occupied and I think that in the past we have possibly been too severe in the matter; and I do not think that the fact of improper occupation or even occupation against order should be an absolute bar, but that the grounds on which the previous orders were made should also be taken into consideration.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 38 OF 1930-31

*Dated July* 22, 1931

Instituted on April 20, 1931, from the order of Deputy Commissioner of district Garhwal.

Kala, Ratan, Bala and other panch hissedars of village Salon, patti Dnaijuli, district Garhwal ... ... *Appellants,*

*versus*

Juplu Mukhtayar, Padam Singh and other panch hissedars of village Bageli Dhaijuli, Garhwal ... ... *Respondents.*

Claim to keep their Kharak in Tuna Tok.

*Held* by Mr. Stiffe, Commissioner, that any *bona fide* resident of Kumaun has full right to use or misuse class I forest as he likes: with certain reservations; and that the Deputy Commissioner's order declaring a right of using of certain Kharak in class I forest is *ultra vires.*

ORDER

This so-called appeal arises out of the fact that two villages have been quarrelling as to the right of using certain kharaks in class I forest. The Deputy Commissioner has made an order on the subject. But neither counsel can tell me under what legal authority such an order has been made nor how the order can be enforced if disobeyed. The only regulation left in class I forest prohibits cultivation in that forest; otherwise every *bona fide* resident of Kumaun has the right at present to use or misuse the forest as he likes. Neither the Deputy Commissioner nor I have any legal power to make an order; the Deputy Commissioner's order is *ultra vires.* I quash it and substitute no other order. The parties must settle among themselves either through the courts or by any other method. I am informed by counsel that the time for the use of section 107 has not yet arrived.

N. C. STIFFE,

*Commissioner, Kumaun Division.*

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## IN THE COURT OF THE COLLECTOR, GARHWAL DISTRICT

REVENUE APPEAL NO. 34 OF 1931-32

*Instituted on April 27, 1932*

Badri Datt and others of Juyalgaon, Dabralsyun ... *Appellants,*

*versus*

Pitamber Datt and others of Khandakhani, patti Dabralsyum ... ... ... ... *Respondents.*

Claim for declaration of rights of user in respect of 120 nalis K.-i-H. land for gaucher panghat, and grass in village Khanda Khani lagga Juyalgaon.

Appeal against the order of Choudhari Harpal Singh Sah, Assistant Collector, 1st class, Lansdowne, Garhwal.

Rai Bahadur Pandit Tara Datt Gairola for appellant.

Thakur Padmendra Singh, Vakil for respondents.

*Held* by Mr. Browne, Deputy Commissioner, that non-resident hissedars and khaikars have equal right of user with the resident hissedars in the common waste land of that village.

ORDER

This appeal was filed by 44 persons against the order of Choudhari Harpal Singh, Assistant Collector, 1st class, dated March 30, 1932. The order (or a suit in which appellants were plaintiffs) decreed with costs to those plaintiffs who were hissedars or khaikars in village Kandakhani right of user in the waste lands including a block marked ACDE in map Ex. P-1 and dismissed the rest of plaintiff's suit.

Before me, only the 29 persons (plaintiffs) who are hissedars or khaikars in Khandakhani have actually argued their case.

The 44 plaintiffs are residents of village Juyalgaon. In the lower courts they sued for declaration of rights of user over about 2000 nalis K.-i-H. benap and in the neighbouring village of Khandakhani where defendants-respondents live. Plaintiffs alleged that their old rights in Khandakhani had recently been interfered with by defendants. Firstly, the lower courts proved that rights of user in Khandakhani belonged to those of plaintiffs who were hissedars or khaikars in that village.

Secondly, the courts found that the area marked ABCD, ACDE is the protected jungle of the Khandakhani people and that plaintiffs have no rights of user therein.

This conclusion is not warranted by the evidence nor by any law. The block ACDE is benap and K.-i-H. land except for the portions on blue chalk which are "nap" land of defendants (admittedly) and which plaintiffs-appellants cannot and do not want to interfere into, the defendants and (indeed the plaintiffs also) have no rights whatever to make a private jungle out of such a large piece of Government land If the defendants did so, they acted wrongly. The fact appears to be that the block was to be made into a panchayati forest but that quarrels between the present parties prevented this. I fail to understand the lower court's remarks that this area which the Khandakhani people specially obtained is in their exclusive possession as a result of litigation between them, the Khandakhani people. This cannot have any effect on the Juyalgaon people (appellants). In consequence of my finding above, it is obvious that 29 appellants who have hissedari and khaikari rights in village Khandakhani have also rights of user in the whole block ACDE excluding the "nap" land of respondents, shown in blue chalk in the map Ex. P-1.

As regards limitation, the lower court remarked that there was no evidence and no satisfactory proof of limitation has been adduced before me.

The only question remaining is that of costs. A cross-appeal is filed by the respondents urging that either no costs have been awarded to plaintiffs or else that proportionate costs should have been awarded. This appeal wrongly states that only 8 plaintiffs have hissadari or khaikari

rights in village Khandakhani the phant shows the number to be 29. The fact now is that while the lower court decreed these 29 persons claim except for ACDE, I decree it for ACDE well except for defendant's nap land in that block. The case of the 15 plaintiffs who lost the suit in the lower court is not argued before me.

As costs must follow the event, I award costs in both courts to the 29 appellants who are hissedars or khaikars in Khandakhani that is to say respondents will pay $\frac{29}{44}$ of the costs in both courts, and the remaining 15 appellants who have not argued will pay $\frac{15}{44}$ of the costs in both courts.

I allow the appeal on behalf of the 29 persons who have hissedari or khaikari rights in Kandakhani, and find that they have all the usual rights of user in the block ACDE of map Exh. P-1 excluding the "nap" land of respondents shown in blue chalk in that map the land consists of plots nos. $\frac{169}{927}$, $\frac{169}{925}$, $\frac{169}{927}$, $\frac{169}{929}$, $\frac{169}{931}$, $\frac{169}{933}$, $\frac{169}{934}$, $\frac{169}{935}$, $\frac{169}{936}$, $\frac{77}{923}$, $\frac{77}{290}$, $\frac{77}{921}$, $\frac{77}{919}$, $\frac{77}{918}$, $\frac{77}{912}$, $\frac{77}{917}$, $\frac{77}{914}$, $\frac{77}{915}$, $\frac{77}{916}$, $\frac{77}{913}$, $\frac{77}{903}$, $\frac{77}{905}$, $\frac{77}{911}$, $\frac{77}{910}$, $\frac{77}{909}$, $\frac{77}{907}$, $\frac{77}{906}$, $\frac{77}{902}$, $\frac{77}{901}$, $\frac{77}{900}$.

I dismiss the appeal as regards the remaining appellants. Costs in both courts as decided above.

*July 9, 1932.*

W. F. G. BROWNE,
*Deputy Commissoner, Garhwal,*

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IN THE COURT OF L. M. STUBBS, Esq., O.S.I., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated October* 21, 1932

MISCELLANEOUS REVENUE APPEAL NO. 103 OF 1931-32

Appeal against the decree order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated July 9, 1932.

*Instituted on September* 14, 1932

Pitambar Datt, Shib Saran, Bhola Datt and others of mauza Khandakhani, patti Dabralsyun, District Garhwal ... ... *Appellants-Defendants,*

*versus*

Badri Datt, Jutha Ram, Bis Ram and others of Juyalgaon, patti Dabralsyun ... ... *Respondents-Plaintiffs.*

Claim for declaration of rights of user in respect of 120 nalis of K.-i-H. land under Nayabad Rules.

*Held* that non-resident co-sharers have equal rights of user with resident co- sharers in the village waste land.

*Held* by Mr. Stubbs, Commissioner, that non-resident co-sharers have equal rights of gaucher with resident co-sharers in the village common waste land.

ORDER

The case is appealed not so much on a point of law as on the plea that the appellants are in equity entitled to what they fought for and paid for.

There is something to be said for this from the point of view of reason but nothing in law and the appellants have no right in severalty.

The appeal is dismissed with costs.

L. M. STUBBS,

*December* 1, 1932. *Commissioner, Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S. DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 31 OF 1933-34

*Instituted on November* 18, 1933.

Appeal against the order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated September 8, 1933.

Daya Shanker Ram Pancholiya and other hissedars of mauza Satti Lagga Lachar, patti Darun, Talla Almora. ... ... *Appellants-Applicants,*

*versus*

Ram Datt Joshi and other hissedars of mauza Satti, patti Darun, residents of mauza Talla Dania, Almora, mauza Satti ... ... *Respondents-Objectors.*

Claim for 10 nalis of benap land.

Under Nayabad Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division that if a Nayabad grant is refused the applicant has a right to file a regular suit under rule 32 of Nayabad Rules of 1931, to have the refusal set aside. *Held* further that although there is no express provision under the Nayabad Rules for an appeal against an order recommending a grant, objections to the grant can be considered both by the Deputy Commissioner and Commissioner.

JUDGMENT

The facts of this case are that the appellant filed an application for Nayabad grant in Satti village, patti Darun, Almora District. Out of 36 hissedars 20 filed objections. The Assistant Commissioner, however, held that the objections had no foundation, and he recommended the grant. An appeal was filed in the Court of the Deputy Commissioner

although it is very doubtful whether an appeal lay. The Deputy Commissioner rightly held that the first court had exceeded its powers in recommending the grant, as under rule 31 (1) of the Nayabad Rules the objection was valid. He therefore refused to recommend the grant.

This is a second appeal under rule 31(3) I see no reason for differing from the lower appellate court and dismiss the appeal. The applicant is informed that under rule 32 he has a right to file a suit to have this refusal set aside.

L. OWEN,

*Deputy Commissioner-in-charge,*
*Kumaun Division.*

I have stated above that it is doubtful whether an appeal by unsuccessful objectors lies. It is therefore necessary to explain that although there is no provision for an appeal against an order recommmending a grant I can see no reason why a miscellaneous application setting forth the objections to the grant should not be considered both by the Deputy Commissioner and Commissioner. The discretion of these two officers is not as far as I can see limited under the rules as they stand.

L. OWEN,

*Deputy Commissioner-in-charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 9, 1934

MISCELLANEOUS REVENUE APPEAL NO. 51 OF 1933-34

*Instituted on January* 2, 1934.

Appeal against the order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, district Almora, dated the 21st November, 1933.

Bhami Chand and others of villages Sowan and Koli, Suti, Nera, Sulmora, patti Kharayat and Mahar, district Almora ... ... *Appellants-Objectors,*

*versus*

Havildar Major Narpati Chand of Daula, patti Kharayat, Almora ... ... *Respondent-Applicant.*

Regarding Nayabad grant under Nayabad Rules.

*Held* by Mr. Owen, Commissioner that although an appeal lies against an order recommending a Nayabad grant neither the Deputy Commissioner nor the Commissioner is bound to accept the recommendation made by the Sub-Divisional Officer, specially if the recommendation is against the rules. A recommendation to disforest for a Nayabad grant conflicts with rule 5(2) of the Nayabad Rules and should be made only in very exceptional circumstances.

ORDER

This is an appeal from the order of the Deputy Commissioner, Almora, forwarding a recommendation for the disforestation of class I forest for the purpose of making a Nayabad grant in favour of the respondent.

The recommendation was originally made by the Sub-Divisional Officer and the appeal to the Deputy Commissioner was dismissed on the ground that no appeal lay and that the objectors should file a suit under rule 33. The lower court was correct in saying that no appeal lay although it was consistent; for, in an appeal heard by me yesterday I had accepted such an appeal and allowed it. My own view is that although no appeal lies, neither the Deputy Commissioner nor the Commissioner is bound to accept the recommendation made by the Sub-Divisional Officer, specially, if as in this case the recommendation is against the rules. There is nothing to prevent the aggrieved party filing a miscellaneous application in either of the superior courts though argument need not be heard as in appeals.

In this case the recommendation obviously conflicts with rule 5(2) of the Nayabad Rules and should only have been made in very exceptional circumstances. I see no reason here for over-riding a rule made by Government. The recommendation will therefore not be accepted and the proposal to disforest is therefore rejected by me. It follows that the Nayabad grant is refused.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 15, 1934

MISCELLANEOUS REVENUE APPEAL NO. 44 OF 1933-34

*Instituted on December* 7, 1933

Appeal against the decree/order of J. F. Sale, ESQ., I.C.S., Deputy Commissioner, Almora, dated October 11, 1933.

Tilok Singh, Dungar Singh and others of mauza Pipali, Malla Silor, Almora .. ... *Appellants-Plaintiffs,*

*versus*

Mahendra Singh of the same place... ... *Respondent-Defendant.*

Claim for declaration to the effect that the *benap* land recommended in the name of defendant is gauchar and for permanent injunction under Kumaun Nayabad Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that no appeal or suit can lie under either of the Nayabad Rules 33 or 36

until a Nayabad grant has been sanctioned. If any suit or appeal is filed before the grant is made it is ooviously premature.

ORDER

This is a most unfortunate appeal arising out of a misinterpretation of the Nayabad Rules.

The facts are that one Mahendra Singh Kanyal applied for a Nayabad grant in village Pipali, patti Malla Silor, district Almora. The grant was recommended for sanction, but before the Commissioner sanctioned it the appellants filed a suit under rule 36/33 to prevent that respondent from bringing the land which they claimed as their gaucher under cultivation. It is unfortunate that the court of first instance did not stop the case at once pointing out that rule 33 could not be made use of until the grant had actually been made by the Commissioner. Rule 36 also only applies to a Nayabad grant. Before the grant has been made it is obviously premature to file a suit under either of these sections and the lower appellate court was quite right in summarily dismissing the appeal.

I understand that a further suit has now been filed. I suggested to the parties that in order to avoid further litigation I should decide the matter on the evidence before me but as they could not agree I am compelled to pass the only orders possible namely that the present appeal be dismissed with costs and that the suit that has recently been filed be proceeded with.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 20, 1934

MISCELLANEOUS REVENUE APPEAL NO. 32 OF 1933-34

Karam Singh, Tilok Singh and others of village Balia, Walla Borarow, district Almora ... *Appellants-Plaintiffs,*

*versus*

Lachman Singh and others of the same village .. *Respondents-Defendants.*

Claims for declaration of rights of user under Kumaun Nayabad Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that no suit lay under rule 33, Nayabad Rules, against a mere recommendation that a Nayabad grant be made, as the grant not having been sanctioned, the suit for its cancellation was premature.

ORDER

This is an appeal from an order of Deputy Commissioner, Almora, allowing an appeal from the Court of the Sub-Divisional Officer of

Baramandal. The facts are that a recommendation for a Nayabad grant was made by the Sub-Divisional Officer who told the unsuccessful objectors that they should file a suit under rule 33 of the Nayabad Rules for the cancellation of the grant. The appellants therefore without waiting for the recommendation to go up to the Commissioner filed a suit under rule 33. The suit was decreed. The other party then filed an appeal in the court of the Deputy Commissioner who allowed the appeal on the ground that the suit was premature.

The Deputy Commissioner's finding is correct. No grant having been made a suit for cancellation of the grant did not lie. Recommendations for Nayabad grants are not necessarily accepted by the Commissioner who alone can make these grants. The appeal is therefore dismissed. The appellants ask for their costs. They have appealed against a perfectly clear order and I cannot allow them costs. The costs of the appeal will be borne by them.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq. I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 19, 1934

MISCELLANEOUS REVENUE APPEAL NO. 16 OF 1933-34

Gaje Singh, Sripal Singh, Chandra Singh and others, village Thapliyalgaon, patti Gagwarsyn, district Garhwal ... ... *Appellants-Plaintiffs,*

*versus*

Amar Singh, Hans Ram Singh, Indra Singh and others, villages Pauri and Kandai, patti Nandalsyun, Garhwal ... ... *Respondents-Defendants.*

Appeal against the order/decree of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated September 11, 1933.

Claim for declaration of user right over nearly 2,000 nalis of K.-i-H. land in Pokhari Chak.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that under rule 7(3) of the Panchayat Forest Rules the orders of the Commissioner establishing a forest panchayat are final, and are not subject to any proceedings either in a Civil or Revenue court.

NOTE:—This ruling has been overruled by subsequent decision, Shib Prasad *versus* Tara Datt Gourala (page 28.)

ORDER

A panchayati forest was established in the Pokhri Chak for villages Pauri and Kandai in the Garhwal District under the Kumaun Panchayat Forest Rules. Villagers of Thaplyalgaon an adjecent village thereupon

sued the panchayat presumably under rule 36 of the Nayabad and Waste Land Rules for a declaration that they had gauchar, panghat and path rights in the land in suit. Their claim was decreed in the court of the Sub-Divisional Officer but this order was reversed by the Deputy Commissioner on appeal, firstly on the legal ground that no suit lay and secondly on its merits.

I do not propose to go into the merits of the case. Under rule 7(3) of the Panchayat Forest Rules the orders of the Commissioner establishing a forest panchayat are final and are not subject to any proceedings either in a civil or a revenue court. The rules, as Mr. Stubbs pointed out in a previous case, are deliberately framed so as to prevent delay and this is why all proceedings have to be carried out by the Deputy Commissioner (or the Forest Panchayat Officer holding Deputy Commissioner's powers on the spot). I have to presume that the rules were duly observed and that all persons interested were summoned and therefore had due information. No argument to the contrary has been advanced. It was for the present appellants to appeal against the Forest Panchayat Officer's order to the Commissioner or to approach the Commissioner in revision. This was not done and therefore that order became final. Agreeing with the views held by my predecessor—in appeal no. 112 of 1932-33—I dismiss this appeal with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 28, 1934

NAYABAD CASE NO. 177 OF 1933-34

*Instituted on January* 11, 1934

Ishwari Datt and Sita Ram and other panch hissedars of mauza Dhound Dhoundyalsyun, Garhwal ... *Applicants,*

*versus*

Ishwari Datt son of Moti Ram and Narayan Datt and others of Dhound and Gadoliun Bangarsyun, Garhwal *Objectors.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 28, 1933.

Objection for refusal of Nayabad grant.

*Held* by Mr. Owen, Commissioner, that Nayabad grants are intended for individuals, and where land is intended for building purposes only for public bodies. Such grants cannot be justified for the extension of the gaon sanjayat of the village.

ORDER

This is an objection to a recommendation of the grant of certain land as Nayabad for cultivation. The original application was unusual; for it was made by 4 of the panch hissedars on behalf of the hissedari body as a whole. I do not think that this kind of application should be entertained. Although the Nayabad Rules nowhere specifically lay this down it seems to me that Nayabad grants are intended for individuals, or where land is intended for building purposes only for public bodies. I do not think such grants can be justified for the extension of the gaon sanjait of the village. Therefore without going into the question of the other points I reject the application for a Nayabad grant on this ground only.

L. OWEN,

*Deputy Commissioner incharge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 30, 1934.

MISCELLANEOUS REVENUE APPEAL NO. 57 OF 1933-34

*Instituted on March* 1, 1934

Fateh Singh, Amar Singh and others of village Chaura, patti Mawalsyun, Garhwal ... ... ... *Appellants,*

*versus*

Mandan Singh and Gopal Singh of the same place ... *Respondents Objectors.*

Appeal from the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated November 9, 1933.

Regarding Nayabad grant.

*Held* by Mr. Owen, Commissioner, that in Nayabad proceedings the number of objectors is immaterial when an order is passed under rule 7 of the Nayabad Rules; nor is it necessary for the point that the grant will materially interfere with the rights of others to be raised by any party. If the Deputy Commissioner is satisfied that the grant will materially affect the rights of other people he has no option but to refuse the grant.

ORDER

This is an appeal from an order of the Deputy Commissioner, Garhwal, rejecting an application for a Nayabad grant on the ground that the grant would interfere with the natural right of extension of another person. The only points argued before me have been that the original number of objectors was very small and that the point on which the Deputy Commissioner relied was not raised by the respondents. It has also been argued that the plots of the respondents were not in fact adjacent to the land in suit.

The number of objectors is immaterial when an order is passed under rule 7. Nor is it necessary for the point that the grant will interfere with the rights of others to be raised by any party. If the Deputy Commissioner is satisfied that the grant will materially affect the rights of the other people he has no option but to refuse the grant. It is part of his duty to ascertain by such means as appear suitable to him whether the grant will adversely affect others. As to the argument that the grant would not interfere with the right of extension of the respondents I have been shown the map and am satisfied that it would do so.

The appeal is therefore dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 30, 1934

MISCELLANEOUS REVENUE APPEAL NO. 130 OF 1932-33

*Instituted on Septe nber* 20, 1933.

Gamal Singh, Udai Singh and others of village Maharagaon Malla, patti Kolagad, district Garhwal ... *Appellants,*

*versus*

Kutu and others of village Bhikhu lagga Maharagaon, patti Kolagad, district Garhwal ... ... *Respondents-Objectors.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated September 6, 1933.

Claim for Nayabad grant under rule 31 (II of Nayabad Rules).

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that where a village and its laggas have a common boundary, the waste lands of those villages are common to all the villages and no one village should be given a Nayabad grant in such common waste so as to materially affect the user rights of other villages.

ORDER

To understand the problem involved in this case it is necessary to explain that Mahargaon Talla is a large village in Garhwal. It has at least three laggas—Baround, Bhiku and Maharagaon Malla and each lagga has its separate phant and other papers generally, but have no separate boundaries. Boundaries serving for the parent village serve also for the laggas and the waste and Kaisar-i-Hind land within those boundaries are therefore common to all four villages and belong to no one village more than another.

The dispute arose out of a claim by villagers of Mahargaon Malla for a Nayabad grant within their Sal Assi boundaries, the application was rejected, more than one-third of the villagers of Bhiku having objected. An appeal was filed in the Deputy Commissioner's Court but was dismissed on the ground that the land lay in Bhiku village and that more than one-third of the hissedars of that village had objected.

Now the fact is, as I have stated above that none of these laggas have got boundaries of their own and the present case is one of several cases of attempts to grab land while the present uncertainty continues. Neither the law nor the rules make any provision for this state of affairs, to encourage these laggas to try to establish a boundary by competing against each other for Nayabad grants is obviously against public policy and will lead to the disappearance of any grazing grounds there may be. I therefore dismiss this appeal on the ground that the grant would materially affect the prescriptive rights of the village as a whole. I would also suggest that no Nayabad grants be made within the Sal Assi boundaries of Mahargaon Talla village until boundaries that will serve for practical purposes have been established for the main village and the laggas.

Appeal dismissed with costs.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

The papers are ordered to be forwarded to the Deputy Commissioner with the request that he will arrange to have a rough and ready boundary fixed for each of the laggas during the next cold weather.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated May 1, 1934*

NAYABAD CASE NO. 763 OF 1932-33

*Instituted on November 22, 1933*

Gatu and Rati Ram of village Nail, patti Malla Dhangu, district Garhwal ... ... ... *Applicants,*

*versus*

Jogeshwar, Maha Nand and Parma Nand of village Nail, patti Malla Dhangu, Garhwal ... ... *Objectors.*

Regarding Nayabad grant of 19½ nalis land.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that Nayabad grants in the same waste land area should be compact and should not be sanctioned in scattered plots.

ORDER

This is an objection filed against a recommendation for a Nayabad grant. I heard the parties in view of the fact that the case had already been considered by my predecessor, but I do not propose to hear arguments in such cases in future though objections will be considered at the time of passing orders. The reason is that there is a tendency to consider such objections as legitimate appeals, whereas there is in fact no appeal from a recommendation for a grant—the objector's relief is by way of suit.

I do not propose to sanction this grant, not for any of the reasons given in the application, but because the grant proposed is made up of several isolated chaks. There should be a very good reason given for dividing a grant into separate parts within the same plot of waste land. If such a grant were made it would make the intervening land to all intents and purposes useless and would also effectively deprive the villagers of their rights over a far larger area of land than the area actually given Nayabad chaks should, therefore, unless the nature of the ground makes this impossible, be compact and if they are not compact they will not be sanctioned.

The grant in this case is refused.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated May* 2, 1934

MISCELLANEOUS REVENUE APPEAL NO. 59 OF 1933-34

*Instituted on January* 13, 1934

Balgovind, Shankermani and others of village Sangura, patti Aswalsyun, Garhwal ... ... ... *Appellants-Applicants,*

*versus*

Bachi Singh and others of village Mirchora, Aswalsyun Garhwal ... ... ... ... *Resondents-Objectors.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy mmissioner, Garhwal, dated September 22, 1933.

Regarding Nayabad grant of 100 nalis under Kumaun Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that where there is a dispute as to which village the land applied

for lies in, no Nayabad grant should be made until the boundary is determined by a regular suit.

ORDER

This is an appeal from an order of the Deputy Commissioner, Garhwal, rejecting an application for a Nayabad grant on the ground that there is a dispute as to which village the land lies in. Until the boundaries were determined, he held, no grant could be made. This order is correct. The appellants should first bring regular suit to prove that the land applied for lies in their own village. The question of making a Nayabad grant can then be gone into.

The appeal is dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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## IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER, KUMAUN DIVISION

*Dated July* 21, 1934

MISCELLANEOUS REVENUE APPEAL NO. 81 OF 1933-34

*Instituted on March* 8, 1934.

Tila, Fakir Singh, Lachhi and others of village Baltir, patti Mali, district Almora ... ... ... *Appellants-Defendants,*

*versus*

Ganga Datt, Krishan Nand and others of Kholi Kanyuri, patti Mali, district Almora ... ... ... *Respondents-Plaintiffs.*

Appeal against the order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated November 25, 1933.

Regarding declaration to the effect that the land under dispute is within sal assi boundary of the plaintiff's village.

*Held* by Mr. Owen, Commissioner, that the principle about home cultivation having priority over outside rights of user no longer applies, and the servient village cannot bring under cultivation waste lands within its own boundaries if the outside village has prescriptive rights over it.

ORDER

There are in Almora two adjoining villages Baltir and Kholi Kanyuri and between the two lies an area of benap land which has been used for many years as a grazing ground apparently by both villages. It is on record that many previous attempts have been made to secure portions of this land for purpose of cultivation and all have been refused.

Until the suit now under consideration was filed the boundary line between the two villages was uncertain; but it has now been decided that the boundary line runs west of the land in suit, which therefore lies in Kholi Kanyuri village no appeal against this finding appears to have been filed in the Deputy Commissioner's Court so that this finding is final.

The only question before this court therefore is whether a Nayabad grant in this area would materially affect the prescriptive or easementary rights of the Baltir villagers. Stress has been laid on Mr. Stiffe's rulings that the rights of a village to cultivate within its own boundaries are superior to any grazing rights which another village may possess within those bundaries. The law has changed since then and so have circumstances—enormous areas of land have come under cultivation and the saving of pasturage for the people has become a pressing problem. Rule 7 of the Nayabad Rules therefore lays down that no extension or grant shall materially affect the prescriptive or easementary rights of persons other than the person making the extension or getting the grant. The important word here is the word "materially." Moreover, this is obviously a question of fact which has to be determined separately in each case and no general ruling applicable to all cases can be given.

There is very little evidence on which a court can rely. I think there can be no doubt that the Baltir villagers had grazing rights in this land. It has been argued that at the time of the Forest Settlement they did not claim to have grazing here. This is incorrect. They claimed grazing rights everywhere in their village and until the present suit was decided they had regularly claimed that this land was within their own sal assi boundaries. As to the question of paucity of gauchar two Deputy Commissioners have seen this land—Mr. Ruttledge in 1927 and Mr. Sale in 1933. The former thought there was no possibility of coming to a decision on this point while the latter thought there was no particular scarcity. Two Deputy Collectors inspected the land and came to conflicting decisions.

On the whole I do not think I would be justified in making a Nayabad grant in this case. The area applied for is not large—about two acres—but it is situated in the middle of the grazing land so that by extension it could in a short time absorb most of the grazing ground.

In respect of the present ground of appeal therefore I find as follows: (1) Mr. Stiffe's rulings no longer apply and (2) the lower court was not called upon to decide the sal assi boundary question as this was not in appeal before it.

The appeal therefore is dismissed with costs but any application for a Nayabad grant in this area will be rejected for reasons given above.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated July* 23, 1934

MISCELLANEOUS REVENUE APPEAL NO. 120 OF 1933-34

*Instituted on May* 14, 1934

Rai Bahadur L. Chiranji Lal, Honorary Magistrate, Tara Datt Upreti, Hari Datt Gurani, Kamlakant and othe reitizens of Almora... *Appellants-Plaintiffs*

*versus*

Jamuna Datt Joshi of mohalla Kholta at present Dhar-ki-Tuni, Almora ... *Respondent-Defendant.*

Appeal against the decree/order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated March 7, 1934.

Regarding cancellation of lease granted to respondent-defendant and declaration of *user* rights under Nayabad Rules.

*Held* by Mr. Owen Deputy Commissioner in charge, Kumaun Division, that the meaning of the phrase within thirty days in rule 38 of the Nayabad Rules is to file the appeal within 29 days. It is a maximum of 29 days.

ORDER

This is an appeal from an order of the Deputy Commissioner, Almora, dismissing an appeal on the ground that it was time-barred.

The appeal raises several interesting points. In the first place rule 38 of the Nayabad Rules lays down that "an appeal shall lie to the Deputy Commissioner if filed within 30 days of the decree or order" In this case the order was signed on the 4th July and the decree on the 15th. Which is the date from which limitation runs? In my opinion the former. The decree was actually prepared on the day the judgment was written but owing to some oversight was not signed until the following day.

The next point, which has not been raised in this occasion, but which is of importance when the whole question hinges on the loss of one day is the meaning of the phrase within thirty days. The meaning is quite clear to me although it was probably not the meaning intended by the framers of the rules that it is a maximum of 29 days. The thirtieth day is not within thirty days nor does the limitation act use this form of phrase.

If my first finding is correct the period that has elapsed is 31 days, and in any case a period of 30 days was allowed to elapse so that the time limit has expired.

It has been argued that the papers were returned for three days to the copying department for the correction of some error but nothing has been shown me on the file in support of this contention. I must therefore

agree with the lower appellate court that this appeal was time barred. The present appeal is therefore dismissed. The respondents are absent and parties will bear their own costs.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, K MAUN DIVISION

*Dated July* 30, 1934

MISCELLANEOUS REVENUE APPEAL NO. 125 OF 1933-34

*Instituted on May* 16, 1934

Nitya Nand Joshi, malguzar, Lachman Singh and others of mauza Shimakhola, patti Palla Borarow, district Almora — *Appellants-Plaintiffs,*

*versus*

Hiraballah Joshi, Nitya Nand and others of mauza Oligaon Palla Borarow, Almora ... ... — *Respondents-Defendants.*

Appeal against the decree/order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated March 8, 1934.

To unset a communal forest scheme on the ground that the land lies in the village of the plaintiffs under Nayabad Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that according to the interpretation of rules 5 and 7 of the Panchayat Forest Rules—Sal assi boundary cannot be determined by summary proceedings under those rules.

ORDER

The villagers of Oligaon in the Almora District had a communal forest established in their village under the Kumaun Panchayat Forest Rules. The establishment of this forest was confirmed by the Commissioner on June 14, 1932. Subsequently the hissedars of three neighbouring villages, Lachhampur, Dhumangaon and Simkhola brought a suit for declaration that a portion of this forest lay within their sal assi boundaries. The court of first instance held that a small portion did actually lie within Dhumangaon village but dismissed the suit on the ground that under rule 7 of the Kumaun Forest Panchayat Rules the Commissioner's order was final. The Deputy Commissioner dismissed an appeal on the same grounds. The present appeal is against the latter order.

I have myself held that in all ordinary cases of gauchar and other rights the Commissioner's order is final and cannot under the rules be called in question in any subsequent proceedings. But the case of *sal assi*

boundaries is quite different. These are sacrosanct and cannot be disturbed in any proceedings of any kind. Once they are located they must be adhered to. It should be out of keeping with the established revenue law of Kumaun to set them aside even in the most formal proceedings unless the chaknamas in Almora or sal Cheanwe in Garhwal overrode them. To admit therefore that the summary proceedings such as these could change the sal assi line would be to depart from one of our oldest principles. Actually the rules themselves provide for this; for rule 5 makes special provision for sal assi boundary disputes, laying down that the Deputy Commissioner's order is liable in this respect to modification by a competent revenue court. This implies that all subsequent orders on this point including the Commissioner's own shall be liable to modification as the result of regular proceedings in the revenue court. I do not think rule 7 was intended to prevent this. I would hold therefore that the sal assi boundary cannot be affected by any summary proceedings under these rules and that this is the correct interpretation of rule 5. I would add that in my opinion this is the only question that is not covered by rule 7.

This appeal must therefore be allowed and the file is returned to the lower appellate court for decision. No arguments having reference to the merits of the case have been heard by me and I am therefore in no position to give an opinion on them. Appeal in respect of the legal point only allowed with full costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated August 7, 1934*

MISCELLANEOUS REVENUE APPEAL NO. 64 OF 1933-34

*Instituted on February 1, 1934*

Appeal against the order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated December 3, 1933.

Pandit Balkrishan Joshi, retired overseer, Ranidhara, Almora ... ... ... ... *Appellant-abadkar,*

*versus*

Bishan Datt and others of Karnathak Khola, [district Almora ... ... ... ... *Respondents-reporters.*

Regarding illicit cultivation (new Nayabad Rules).

*Held* by Mr. Owen in charge Kumaun Division, that a man must not close the village paths, or obstruct a right of way; while with regard to

ravines, it has been customary to regard streams, ravines, roads and other natural obstructions as limiting the rights of extension. This is an old custom, which is well recognized throughout Kumaun, though no written rule can be cited. Nevertheless it is reasonable to accept this well-established principle. Otherwise there would be no limit to extension. *Held* further that all natural or artificial features which act as a barrier to the natural extension of cultivation should be regarded as limiting the right of extension.

ORDER

This appeal relates to benap land lying within the municipal boundaries of Almora which owing to an oversight or for some other reason has never been constituted into nazul. The appellant extended from his nap land into the area in question which he walled, without however bringing it under cultivation. In the course of extension he crossed a settlement path and a ravine. The lower appellate court held that in doing so he had contravened the ordinary customary rules and directed the evacuation of the land lying beyond the path and the ravine. This appeal is against the order and the appellant pleads (1) that the settlement path ceased to exist many years ago, (2) that it cannot bar extension and that a ravine does not bar extension.

It must be premised that the Nayabad Rules are silent on these points, but with regard to paths Stowell lays down that "a man must not close any of the village paths or obstruct a right of way" while with regard to ravines it has been customary to regard streams, ravines, roads and other natural obstructions as limiting the right of extension. This is an old custom and one which is well recognized throughout Kumaun though I can find no rule or ruling which supports it. Nevertheless it is reasonable to accept this well-established principle otherwise there would be no limit to extensions. I would therefore hold that all natural or artificial features which act as a barrier to the natural extension of cultivation would be regarded as limiting the right of extension. Indeed this is only logical, for, once an extension is broken it ceased to be an extension and becomes a fresh start. In respect of the land west of the ravine the appeal is therefore dismissed.

With regard to the path however there seems to be a consensus that this disappeared some time after the new road was made and that it is no longer used. If this is correct I do not see how we can stop extension beyond a path which has ceased to exist. In respect of the land south of the path and east of the ravine the appeal is therefore allowed.

I do not propose to change the amount of compensation. Parties will bear their own costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division*

IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated* 21, 1934

MISCELLANEOUS REVENUE APPEAL NO. 46 OF 1933-34

*Instituted on December* 13, 1933

Ram Krishan and Brahma Nand of village Dharkot, patti Kapolsyun, Garhwal .. ... ... *Appellants-Objectors,*

*versus*

Murli Dhar, Bhola Datt and Ganpati of the same place ... *Respondents-Applicants.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated November 12, 1933.

Regarding Nayabad grant of 25 nalis of land under Kumaun Rules.

*Held* by Mr. Owen in charge, Kumaun Division, that any District Officer cannot permit Nayabad applications to be interfered with by the action of the other party in breaking land after the application has been made.

ORDER

This is an unreason objection, arising out of a family dispute, to a a Nayabad grant. Both parties are brothers. One set of brothers the appellants, received a Nayabad grant of twelve nalis whereupon the other pair of brothers (respondents) also applied for a grant. Plots nos. 1, 3 and 4 on the amin's map were recommended by the Sub-Divisional Officer. The Deputy Commissioner in addition to these plots has recommended plot no. 2 in order to make the grants equal. The appellants have objected to the grant as a whole but in particular object to the grant of plot no 2 which is they argue in their possession. The patwari's evidence shows that the plot of land was hurriedly brought under cultivation by the appellants after the Nayabad grant had been asked for. The Deputy Commissioner included it in his recommendation as it was not a genuine extension. This appears to be a wholly reasonable view. A District Officer cannot permit applications for Nayabad to be interfered with by the action of another party in breaking up the land after the application has been made. Moreover in common equity the respondents are entitled to a grant similar to that made to their brothers. The recommendation of the Deputy Commissioner will be accepted. The two sets of brothers are advised to compose their differences and live in harmony.

I have inadvertently used the words "appellants" and respondents" in this order. Actually no appeal lies and the ojections are treated as a miscellaneous application.

There is therefore no question of costs.

L. OWEN,

*Deputy Commissioner in charge, Kumaun Division.*

PETITION NO. 22 of 1933-34

*Copy of Board's order passed in the case of* BIR DEV, *applicant, versus* ISHAWARI DATT, *respondent, mauza Gurphali, patti Dhondyal-syun, Garhwal*

Application for review of the order of the Board of Revenue, United Provinces, dated March 9, 1934, in a case of declaration.

*Held* by the Board of Revenue, that the period of limitation does not run from the date of the wrong entry in revenue papers but from the date on which the right of entry was first infringed, secondly that revisional jurisdiction lay with the Board under the Nayabad Rules of 1916; but not under Nayabad Rules of 1931 and that revision to the Board lies in respect of Nayabad application made prior to the passing of 1931 Rules, and that home cultivation has preference over outside rights of user.

One Pandit Jiva Nand of mauza Chopta applied for a Nayabad grant of 97/2/16 nalis of land. This application was made under the Nayabad Rules of 1916.

A preliminary objection is raised that revisional jurisdiction does not lie with the Board. But both the application and suit to contest the validity of the grant were filed when the rules of 1916 were in force; and it has been judicially held by the Board that revisional jurisdiction lay with the Board under those rules (S. D. 11 of 1932) and there is no force in this contention.

Rule 4 of these rules lays down how the Assistant Collector shall proceed when he receives an application for a grant. What actually happened in this case does not transpire, but I gather that the people of mauza Gurphali the present applicants—and the people of Dhaund—present respondents second set—made objections which were disallowed by the Assistant Collector and that the disallowance of those objections was upheld by the Commissioner who finally sanctioned the grant.

It should be mentioned at this stage that the land applied for comprises portions of a larger area and appears to represent portions of that larger area which were once cultivated.

Now in 1893 at the time of settlement a dispute took place between the people of Gurphali and the people of Dhaund regarding this larger area which I will call the area in suit to distinguish it from the area of which the Nayabad grant had been made. One P. Manik Lal, Assistant Record Officer, who dealt with the dispute in formal proceedings came to the conclusion that the area belonged to neither village, but to the village of Chopa, of which Pandit Jiva Nand, respondent no. 1, and applicant for the Nayabad grant, is the hissedar. He seems to have made a consequential order to the effect that the area should be shown in the records

of mauza Chopta. It seems to have been so shown ever since. Now Pandit Jiva Nand has come forward with an application for Nayabad grant of part of the area and the application has been granted, he was obviously justified in doing so.

Both the people of Gurphali and the people of Dhaund filed suits to contest the grant, or as rule 14 of the Nayabad Rules of 1916 expressed it " suits to establish claims to affecting the validity of the grant."

The people of Dhaund claimed to be in possession of the north-western corner of the area both by virtue of user and cultivation.

The people of Gurphali claimed to have been exercising rights of user over the whole area in 1893 to have exercised them ever since and to be still exercising them.

The suit of the Dhaund people was dismissed while that of the Gurphali people were decreed both as against Pandit Jiva Nand and the people of Dhaund. The finding of the Assistant Collector was not only that the people of Gurphali have been exercising these rights over the area in suit, but that the order of 1893 did not cover the area in suit.

Appeals in both cases were made. But the people of Dhaund came to a compromise with Pandit Jiwa Nand who seems to have conceded their claim to the north-western corner. So the appeal of Gurphali was against both Pandit Jiva Nand and the people of Dhaund.

The Deputy Commissioner came to the conclusion that important question was that of limitation and the suit was time barred. The learned Commissioner upheld the decision.

The application will presumably be governed by rules 2—17 of the Kumaun Tenancy Rules of 1918 but it is against correctness of this finding that the argument is chiefly directed. It is a pity that the Deputy Commissioner did not state under what article of the Limitation Act the suit was time barred. When asked, learned counsel for the respondents pointed out that the effect of article 14 was to set aside any act or order of an officer of Government in his official capacity, not otherwise expressly provided for. The period of limitation under that article is one year from the date of the act or the order. This hardly seems to apply. The order would presumably be the consequential order that the area should be shown or recorded within the boundaries of Chopta. But this is not what the applicants complain of. It is quite clear from their memorandum of appeal that their point is, whether the land is recorded in the boundaries of Chopta or some other village, they have always been exercising rights of user and these rights are infringed by the grant. I find no article in the Limitation Act under which the suit would specially fall it must therefore fall under article 120 (Suits for which no period

of limitation is specially prescribed). The period of limitation under this article is six years from the time " when the right to sue accrued."

The position taken up by the appellants that a right to sue accrued when this grant was sanctioned. They have always been exercising rights of user; and they were not bound to bring a suit until those rights were infringed or challenged. Their suit is well within six years of the infringement which is constituted by this grant. The position is taken up by the respondents and apparently supported by the Deputy Commissioner is that the right to sue accrued in 1893 when the Assistant Record Officer with the knowledge of the appellants found that the area did not belong to Gurphali or Dhaund but to Chopta and ordered it to be recorded as such.

Now there are several rulings to support the proposition that if an erroneous entry in the revenue records is made, even with the knowledge of the person affected such person will not be debarred from bringing a suit to establish his title if he remains in possession, till six years after his title is challenged. The determination of the question at issue therefore seems to me to turn on the question of fact, whether the people of Gurphali have in fact in spite of the finding of the Assistant Record Officer and the order he passed, been exercising rights over the area. The Assistant Collector who tried the case with care came to the conclusion that they have been exercising such right. The Deputy Commissioner who evidently carefully and judicially considered the evidence came to the conclusion that the exercise of such rights had not been proved. He also gives reasons for holding that such rights could not have been exercised.

The learned Commissioner to whom a second appeal lay on the grounds mentioned in section 100, Code of Civil Procedure, (*vide* rule 14 of Kumaun Tenancy Rules) does not specifically mention the subject, but appears to have declined to go into the question of fact. The Board's jurisdiction in revision would be limited under rule 17 to seeing whether the Commissioner had a jurisdiction not vested in him by law or to have acted in the exercise of jurisdiction illegally or materially irregular exercise of jurisdiction is disclosed.

The finding of the Deputy Commissioner therefore must prevail. If then the people of Gurphali have not been proved to have ever possessed or to have ever exercised or to be exercising rights of user over the area in suit, their right to sue arose with the order of 1893 which removed the area from the boundaries of their village. At the same time there is no reason apparently why people of one village should not exercise rights of user over lands included within the boundaries of another village; but the position would be unusual. It would be bound to give rise to disputes. And the San Assi boundaries in Kumaun no doubt roughly represent the areas over which the inhabitants of the various villages consider that they have rights of user: this is why so

many of these disputes take the shape of boundary disputes. But the learned Commissioner has shown by the customary law of Kumaun rights of user would have to give place to home cultivation: and the possessor of the right would have no claim to contest a Nayabad grant or as he puts it there would be no cause of action.

In short, the position arising out of his judgment as I conceive it is this: that the area has been found by a competent court in 1893 to lie within the boundaries of mauza Chopta; that the finding of the Commissioner that the people of Gurphali have not been proved to have been exercising rights of user over the area in suit must be accepted; and even if it were true that they had been exercising rights of user in lands lying within the boundaries of another village, these rights would have to give place to rights of cultivation by the hissedars of that village. Their claim therefore is both time barred, limitation running from 1893, and otherwise out of Court. The judgment of the learned Commissioner is traversed in the grounds of revision on other grounds also; but I do not think it is necessary now to go into them. The appeal to him, as also this application in revision, has been pressed mainly on the ground of limitation. The fact remains that by the order of a competent court as far back as 1893, the area in suit was found to lie within the boundaries of Chopta, the village of the applicants must have been fully aware of this finding; that in Kumaun these disputes regarding rights of easement generally take the shape of boundary disputes, and that an adjudication as regards boundaries is generally held to settle them once and for all.

There are number of rulings which support the view that a right to challenge such a position more than six years after the finding was enunciated and an entry based on such finding made in the revenue records within the knowledge of claimants does not exist (sic.) e.g. 20, Allahabad (Akbar *versus* Turban); 23, 25 (37) F. B. Legge *versus* Ram Saran; 31 Allahabad 9 (Akbar *versus* Turban) 20 A. L. J. 231, A. I. R. 1922 Allahabad 115 (Gopal Das *versus* Thakur Ganga); 896 A. L. R. 1927 Oudh 21 (Mahabir *versus* Jageshar). These rulings appear to me to be apposite and to support the view taken by the Deputy Commissioner and Commissioner which is also a commonsense view, having regard to the peculiar conditions of Kumaun.

I hold, therefore, that even if interference in revision were justified by the wide wording of rule 17, on a point of law, the decision of the learned Commissioner upholding the finding of the Deputy Commissioner was correct, and dismissed the application with costs and pleader's fees Rs.15.

D. L. DRAKE-BROCKMAN,

*Junior Member.*

*October* 9, 1934.

## IN THE COURT OF R. JOHNSTON, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

MISCELLANEOUS REVENUE APPEAL NO. 171 OF 1933-34.

*Dated March* 9, 1935

K. Mani Chand, etc. Mawani, Barabisi, Almora .. *Appellants,*

*versus*

Bhim Singh, etc. of Gobrari, Barabisi, Almora ... *Respondents.*

and

MISCELLANEOUS REVENUE APPEAL NO. 176 OF 1933-34

*Dated March* 9, 1935

Bhim Singh and others ... ... ... *Appellants,*

*versus*

K. Mani Chand and others ... ... ... *Respondents.*

*Held* by Mr. Johnston, Deputy Commissioner in charge, Kumaun Division, that Nayabad grant should not be granted to joint applicants. It is open to anyone to put in his separate application for Nayabad grant and this will be accepted or rejected according to circumstances.

ORDER

This is an appeal in a Nayabad case. Some 30 men Bhim Singh and others of village Gobrari applied for several scattered plots of Nayabad which where recommended by the Sub-Divisional Officer. The learned Deputy Commissioner disagreed with the Sub-Divisional Officer's recommendations and pointed out that these scattered plots would form separate foci of extension into benap land and therefore accepted Nayabad only for a portion of the plots. Against this I have two appeals (*a*) from Gobrai village saying that the original application for Nayabad should be granted, (*b*) from Mani Chand and others of mauza Mawani saying that no Nayabad grant should be given at all. The learned counsel for Gobrari has put up a good case for his clients, but has avoided what seems to me the weakest point in his case which is that it has been a regular practice of this court to refuse Nayabad applications to joint applicants. In my opinion this procedure is very sound and should be followed. It is open to anyone of the 30 applicants to put in his separate application for Nayabad which will be accepted or rejected according to circumstances, but I am not prepared to accept even the Deputy Commissioner's recommendation in favour of 30 joint applicants. I, therefore, admit the appeal of Mani Chand and others of mauza Mawani and dismiss the appeal of mauza Gobrari with costs.

The argument was mostly directed to showing that the area in which Nayabad was requested lay within the *sal* assi boundaries of village Gobrari and that although mauza Mawani admittedly had gauchar rights within mauza Gobrari area yet those gauchar rights could not over-ride the claims of Gobrari to extension of cultivation or to Nayabad grants.

As a general principle this is doubtless correct, but I think it would be very unwise to say that this principle must always be applied in every case. It is evident that circumstances must be considered. If village A has large areas of gauchar within its own boundary as well as grazing rights in village B, it would probably have a poor case in trying to prevent village B from extending cultivation on the ground that village A has grazing rights over that area. But if village A itself has no other gauchar and the extension of cultivation by village B materially damages the prospects of village A, then the case may be different. My predecessor noted that the important word in the rules is "materially" and the prescriptive or easementary rights of other persons "materially affected." This is a question of fact which is to be determined separately in each case. No general ruling can possibly be given.

R. JOHNSTON,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated July* 6, 1935

MISCELLANEOUS REVENUE APPEAL NO. 43 OF 1934-35

*Instituted on February* 10, 1935

Bishal Mani, Nooten Mani, Bidya Datt and Bishun Datt of Ali, patti Paidulsyun, district Garhwal ... *Appellants*,

*versus*

Thag Ram, Tulsi Ram, Maya Datt and others of village Ali, patti Paidulsyun, district Garhwal ... *Respondents*.

Appeal against the order and decree of Captain R. H. G. Johnston I.C.S., Deputy Commissioner, Garhwal, dated November 29, 1934.

Declaration of user, rights over benap and K.-i-H. land under Nayabad Rule 36 of 1931.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that the entry in the halat gaon of one village that it has gauchar rights in another village is not sufficient to prove such rights or shift the burden of proof on the servient village, unless there is a corresponding entry in the halat gaon of the other village.

ORDER

This appeal arises but of a suit brought by the villagers of Ali praying for a decree to the effect that they had rights of grazing, grass and fuel in Bhakra village. The suit was dismissed in the court of first instance

but this finding was reversed on appeal by the learned Deputy Commissioner.

The whole question is exceedingly complicated owing to the different views which have been taken at different times of the status and position of Bhakra.

Prior to British rule it seems to have been a separate entity being given to one Siromani Nauryal on payment of a nazrana of Rs.25. In Mr. Beckett's settlement it was recorded as a separate village. In Mr. Pauw's settlement it was apparently regarded as a lagga of Ali. In 1920 in Mr. Ibbotson's settlement the Assistant Record Officer noted that it was a lagga of Ali and also of a third village, Rikholi. It will thus be seen that there has been considerable confusion as to the status of the village but I am bound to assume that the status determined at the last settlement is the correct one.

The first point for me to consider is whether limitation applies. This question was not raised in the lower appellate court either directly or by way of cross-appeal and I cannot therefore consider it at this stage. It must be held that the suit is not barred by limitation.

The next question is the question of fact. Had the villagers of Ali rights of grazing in Bhakra? The onus of proof lay on them and it becomes necessary to consider the nature of the proof.

There is the Tahsildar's report that the land in suit which is admittedly in Bhakra village line close to the Ali abadi and that it is therefore highly probable that the Ali cattle did graze there. The evidentiary value of this document is practically nil. The Tahsildar does not say that he saw Ali cattle grazing there nor does he wish to give evidence.

There is the usual contradictory oral evidence but the court which heard it believed the Ali people to be in the wrong.

There is a joint application for a panchayat forest ? over the land in suit but this apparently never took effect as when the panchayati forest officer took the matter into consideration the Bakhra people insisted on their land being separated.

There is an entry in the Ali gaon halat that the villagers had gauchar rights in Bakhar. This is the strongest bit of evidence in favour of Ali village but is discounted by the absence of as similar entry in the Bakhar gaon halat.

It will be seen from the above that the case for Ali village is very weak indeed.

As against it we find that Bakhra has for a long time been treated as a separate entity and that it is therefore not easy to believe that another village would have grazing rights in its land. Further claims for fuel rights "Mayabanaun" were made by Ali village at the settlements both

of 1859 and 1893 but were subsequently withdrawn. This destroys the present claim for fuel right and weakens the case for grazing rights. The lower appellate court was doubtful whether jungle rights included grazing rights but it must be remembered that negative evidence is poor evidence and the only positive evidence we have that Ali village had grazing rights in Bakhar is the entry in the Ali gaon hálat. Incidentally the Sub-Divisional Officer who inspected the village in 1929 reported that Ali had ample gauchar and fuel while the Tahsildar who inspected in 1934 reported that it had very little.

I have given this appeal anxious consideration and I am as satisfied that the villagers of Ali have failed to discharge the burden of proof. I, therefore, allow the appeal, set aside the order of the Deputy Commissioner and restore that of the court of first instance. Costs against respondents.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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PETITION NO. 7 OF 1932-33

*Copy of Board's order passed in the case of* KHIM SINGH, *etc., applicant* versus KESHAB DATT, *etc. respondents, mauza Bairti, patti Wala Gewar, pargana Pali, district Almora*

Application for revision of the order of the Commissioner of Kumaun Division, dated November 18, 1932, in the case of declaration of rights.

*Held* by the Board of Revenue that limitation in suits for setting aside Nayabad grants is governed by the Nayabad Rules which were in force when the suit was filed and not by the rules in force when the Nayabad application was made.

ORDER

I admitted this application for hearing because I was doubtful whether any revision lay. The applicant brought his suit under section 14 of the old rules of 1916, regulating applications for and Nayabad lands. But those rules have been abrogated by the rules of 1931. Chapter I, rule 1 of the Rules says that these Rules will come into force on April 1, 1931, and shall apply to applications made on or after that date. Application made previous to that date shall be dealt with in accordance with the rules previously in force. This only refers to application. It does not apply to " suit or applications to establish a claim effecting the validity of a grant " under section 36 of the new rules. It has been judicially held by the Board that no application in revision lies to the Board under the Nayabad Rules of 1931. I am unable to agree with the contention of learned counsel that because this particular grant was made when the new rules were in force, therefore any suit relating to it for ever and ever will

be governed by the rules which were in force at the time it was granted. Any suit relating to it must be governed by the rules in force at the time the suit is brought. No application in revision, therefore, lies and the application is dismissed with costs and Rs.10 pleader's fee.

D. L. DRAKE-BROCKMAN,

*Senior Member.*

*Dated September* 5, 1933.

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NOTE—This ruling has been over ruled in Bir Dev *versus* Ishwari Datt, petition no. 22 of 1933-34, reported on page 62.

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## IN THE COURT OF A. W IBBOTSON, ESQ., C.I.E., M.B.E., M.C., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated June* 12, 1937

MISCELLANEOUS REVENUE APPEAL NO. 93 OF 1935-36

*Instituted on June* 16, 1936

Kulomani, Lalmani, Chandera Mani, sons of Tarapati, Harak Singh and others of Chamdoli, talla Silore, district Almora .. ... ... *Appellants,*

*versus*

Mathura Datt, Lokmani, sons of Padmapati of Chamdoli, talla Silore, district Almora ... .. *Repondents.*

Appeal against the decree and order of W. W. Finlay, Esq., I.C.S., Deputy Commissioner, Almora, dated April 22, 1936.

Nature of case: *Re* Nayabad grant.

*Held* by Mr. Ibbotson, Deputy Commissioner in charge, Kumaun, that Limitation in suits for setting aside Nayabad grants is governed by the Nayabad Rules which were in force when the suit was filed and not by the rules in force when the Nayabad application was made.

ORDER

This is a second appeal under Nayabad Rules, involves one clear problem of law which has been fully argued on both sides, namely whether the period of limitation that should apply is the "one year" laid down in rule 34 of the 1931 Nayabad Rules, or the "six months" laid down in rule 34 of the 1934 Rules.

The application of the grant was made under 1931 Rules before those of 1934 came into force.

The grant was made on September 14, 1934, after the 1934 Rules came into force, and the suit for cancellation now under appeal was filed on September 10, 1935.

The appellants argue that the period of limitation was one year under the old rules and have produced rulings :

Allahabad High Court, Full Bench Ruling : Haider Hu san *versus* Puran Mal, reported at page 895.

Allahabad Law Journal Volume 33, 1935 to the effect that an amendment of the law can have effect immediately on procedure, but can not have retrospective effect on the substantive law.

Also a Calcutta Ruling, A. I. R. 1931, Calcutta 321, Kanak Kanti Roy *versus* Kripa Nath Gain and others. All India Reports, 1931, to the effect that no statute is to have a retrospective effect greater than its language indicates.

The argument is in fact that presented by the original court of trial in this case that this suit is a proceeding on the "application" for Nayabad and that in spite of the Board's Ruling no. 7 of 1932-33 which has been referred to, the "application" had not finally been dealt with until this suit was decided and, therefore, the one year's limitation applies.

To this the argument of the respondent is that the application was finally dealt with when the grant was definitely, not provisionally, sanctioned on September 14, 1934, and that the rules of 1934 governing procedure, and including limitation in the law of procedure, then applied and that, therefore, the period of limitation was six months.

In support of this argument it is stated, and with truth, that the actual plaint in the suit states that it is brought under the Nayabad Rules of 1934.

In my opinion the argument of the respondents prevails, If the suit had been in the opposite sense, that is if a grant had been "provisionally refused" and a suit had been brought to set aside the refusal, I should have regarded the "application" as not finally dealt with, and allowed the one year limitation.

But in the rules of 1931, as of 1934 there is no such thing as the 'provisional" sanctioning of a grant, and the argument of the Sub-Divisional Officer originally trying the case fails on the point. The substantive law is in fact the same in the 1931 Rules as in those of 1934 on this matter.

This being so the lower appellate court is right in following the ruling of the Board of Revenue no. 7 of 1932-33, though that ruling may not have formal legally binding effect.

I dismiss the present appeal with costs.

A. W. IBBOTSON,
*Deputy Commissioner,*
*In charge Kumaun, Division.*

*Dated June* 12, 1937.

NOTE—*See* note under Board's ruling, Khim Singh *versus* Keshab Datt, on page 69.

PETITION NO. 6 OF 1928-29

*Copy of Board's Order passed in the case of* GYAN SINGH, *etc. applicants* versus SHERU, *etc. respondents of village Salda, pargana Barasyun, district Garhwal*

Application for revision against the order of the Commissioner, Kumaun Division, dated July 25, 1928, in a suit for declaration of exclusive right of user.

*Held* by the Board of Revenue that the rights recorded by the Forest Settlement Officer under section 7 of the Forest Act afford the strongest presumption of the pre-existence of such rights and even if such pre-existing rights cannot be proved the rights so recorded are not extinguish on disforestation under section 27 of the Forest Act.

The applicants, representing the hissedars of village Salda, sued for a declaration against the hissedars of Khola, Thamana and Kursara of their exclusive right to use the forest within the Sald boundary and certain laggas and for an injunction against the hissedars of those villages forbidding them to take grass or fuel from the forest in question.

Three classes of so-called "forest" have to be considered. The first of these is the Khulasu block which was declared to be reserved forest some years ago and was recently disforested. The second is certain "chir" and other plantations made by the Sald people on their own measured lands; and the third is such forest or waste land as lies within the Salda boundary, but is not included in the first two categories.

The Assistant Collector held that the Khola and Thamana people had fuel and fodder rights within the Khulasu block only and granted the plaintiffs a declaration of their exclusive right in the remaining forest areas of Sald and its laggas. It was held that the Kursara people had no rights in the area in suit, and they filed no appeal. The case was taken to the Additional Deputy Commissioner, Garhwal, in appeal, and a cross-objection was filed on behalf of Khola people only claiming rights in the other forest areas outside Khulasu block. The appeal and the cross-objection were dismissed, with a slight modification as regards costs only. The plaintiffs and the hissedars of Khola then went to the Commissioner, who maintained the orders of the courts below regarding the Khulasu block but held that both Khola and Thamana had rights in the rest of the forest lands of Sald, excluding the plantations made by the people of that village, and the latter have come to this court in revision.

The Khulasu block is included in the boundary of Sald, but when it was declared to be reserved forest and inquiry was held by the Forest Settlement Officer, who recorded the Khola and Thamana people as having fuel and fodder rights in the block. He also held that the Thamana people had the right to collect bark and leaves. It is contended on behalf of the applicants that it was necessary for the defendants in question to prove that they had such rights prior to reservation and that if they fail in this, any rights allowed to them by Government during the

period of reservation would disappear when the block was disforested. The result of the inquiry held by the Forest Settlement Officer affords the strongest possible confirmation of the oral evidence given by the Khola and Thamana people as to the previous existence of these rights, nor is it possible to believe that the said people would have accepted the finding had it not been a recognition of previously existing rights, as provided by section 7 of the Forest Act.

Even if such pre-existing rights had not been proved, the present claim of the Sald people would be barred by section 27 of the Forest Act.

The application must fail so far as the Khulasu block is concerned.

The Commissioner appears to have been under a misunderstanding as regards the case of Thamana people. They filed no cross-objection claiming rights beyond those declared in their favour by the Assistant Collector, nor did they file any cross-objection in the Commissioner's court. It was therefore not within his jurisdiction to deal with any alleged rights of theirs outside the Khulasu block.

It remains, therefore, to consider only the claim of Khola people to fuel and fodder rights in the Sald forests other than the Khulasu block and the special plantations made by the Sald people. The burden of proof was on the hissedars of Khola, and the finding of the Assistant Collector and the Additional Deputy Commissioner practically amount to one that the Khola people had not previously exercised such rights. This finding can be reversed only if it is shown to be contrary to the evidence. There is no great strength in the oral evidence produced by the Khola people, and the Commissioner was wrong in attaching weight to the "Halatgaon" of the recent settlement, for that record was the cause of action before him. The Assistant Record Officer came to a finding adverse to the Sald people on September 23, 1926, and the result of his finding is recorded in "Halatgaon", which the Sald people promptly impugned by the present suit.

I would hold that the decision of the Assistant Collector is final, so far as the Thamana people are concerned, and that the Khola people have failed to prove that their rights extend beyond Khulasu block.

I would therefore set aside the order of the Commissioner and restore that of the Assistant Collector, as modified by the Additional Deputy Commissioner in respects of costs. The application being partly successful, and partly unsuccessful I would allow the applicant half costs only in this court.

J. C. SMITH,
*Junior Member.*
14-5-1929.

TO SENIOR MEMBER—

I agree.

R. OAKDEN,
*Senior Member.*
16-5-1929.

## CHAPTER III—Pukka Khaikars.

### IN THE COURT OF R. ERSKINE, Esq., COMMISSIONER, KUMAUN DIVISION

*Dated May* 13, 1890

REVENUE APPEAL NO. 121 OF 1889

Padmoo and other khaikars ... ... ... *Appellants,*

*versus*

Gauri and Gajai ... ... ... ... *Respondents.*

*Held* by Mr. Erskine, Commissioner, *that the* common waste land in lagga village in which the hissedars residing in the parent village have no khudkhast, is under the control of and at the disposal of the khaikars; and that the hissedars have no right to appropriate it and divide it amongst themselves.

NOTE—The appeal to the Board against this order was rejected.

ORDER

The decision of the lower courts appears to me to be wrong. It seems to me that Timli distinctly is subject to the general custom whereby all the land in the village is under the control of the khaikars, when khaikars are the only cultivators. I am unable to follow the reasoning by which the lower court comes to the conclusion that Timli is an exception to the rule. In the "phaut" the details for Timli are distinctly given from those for the parent village. Amongst these detail are:

Sanjayat gaon (common to the village) 14-9-16 nalis sanjayat *ijran parat bahik* (common waste unassessed) 192-9-16 nalis.

The first of these items evidently relates to *cultivated* common land, the second to *uncultivated*. The first is shown lower down as occupied by two persons who were not sharers, but were the sons of sharers. It is fair then to assume that like the rest of those named in the same part of the phaut, they were *khaikars*: and then the entry of their names does not indicate that any Bharers had an interest in the village. The "common unassessed" was, I presume, the waste common to Timli; if it were common to the parent village (Pali) or common to Pali and Timli it would not appear under Timli only.

For these reasons I hold that the land in dispute is under the control of and at the disposal of the appellants and that the respondents have no right to appropriate it and divide it amongst themselves.

I, therefore, accept the appeal, set aside the order of the lower court and decree plaintiff's claim with costs in all courts.

R. ERSKINE,

*May* 13, 1890. *Commissioner, Kumaun Division.*

IN THE COURT OF E. K. PAUW, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*Dated July* 18, 1935

CIVIL APPEAL NO. 45

*Instituted on April*, 1895

Sher Singh of Umta, patti Bungi ... *Appellant-Defendant,*

*versus*

Madhu and others of mauza Bawani, patti Bungi ... ... ... *Respondents-Plaintiffs.*

Appeal against the order of Pandit Jai Dutt Joshi, Deputy Collector, dated March 1, 1895. July 18, 1935, Camp Lansdowne. Present Madhu, respondent.

*Held* by Mr. Pauw, Deputy Commissioner, that the khaikars in a village held entirely by them, are under-proprietors and that the right of such under-proprietors is absolutely indefeasible.

ORDER

The law as laid down by the lower court is undoubtedly sound, it has been repeatedly ruled that a hissedar cannot get a footing as such in a village held entirely by khaikars. In such a case the khaikars are under-proprietors and it has been ruled in some Almora cases that the right of such under-proprietors is absolutely indefeasible, that even if the hissedar gets possession of some khaikari land in any way by collusion or otherwise, he does not beat down the khaikars rights to inherit the property of childless deceased khaikars, he can on such occasions claim no larger share of the deceased's holding or of the relinquished holding than if he were a khaikar and not a hissedar. This objection in appeal is, therefore, futile.

The appeal is dismissed with costs.

E. K. PAUW,

*July* 18, 1935. *Deputy Commissioner, Garhwal.*

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IN THE COURT OF V. A. STOWELL, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*Dated July* 24, 1909

REVENUE APPEAL NO. 11

*Instituted on June* 10, 1909

Musammat Chhila through her husband Jot Ram of mauza Guwalkura, patti Chopraka ... ... *Applicant,*

*versus*

Inder Singh, Sher Singh, Bhim Singh, Darshani Bakhtawar Singh, of mauza Bidoli, patti Bidolsyun ... *Respondents.*

Appeal against the order of Pandit Janardan Joshi, Assistant Collector, first class, dated May 28, 1909, decreeing respondent-plaintiff's suit

against appellant-defendant, dated July 24, 1909. Present Jot Ram for appellant five respondents.

*Held* by Mr. Stowell, Deputy Commissioner, Garhwal, that the hissedars cannot sue for a mortgage of khaikari holdings in a pakka khaikari village to be declared null and void.

ORDER

This suit was a rent suit for the ejectment of a tenant. The rent court trying it has passed what is practically a civil suit decree that the mortgage be declared null and void. I consider however that the suit is not maintainable at all. The village in which the land is situated is a purely khaikari lagga cf. respondents' written statement and the evidence. If the hissedars have effected any entry within such a village it does not help them (Mr. Reid's ruling, paragraphs 86–88, Land Tenures Manual). The phant however shows that the hissedars have no khudkasht in the village.

The privileges of asl under-proprietory khaikari villages extend to similar laggas.

Now in such villages on the central principle laid down by Sir H. Ramsay "the hissedar has no power to interfere with these khaikari or their land."

If a khaikar in such villages has no power to mortgage his holding (which is probably not true in such under-proprietory villages) then the persons who could successfully intervene would be the panch khaikars of the village, the reversioners to lapsed holdings.

In any case the hissedars cannot claim to come in and get khudkasht.

I accept the appeal and reversing the lower court's order dismiss the suit: Costs on plaintiffs-respondents in both courts.

V. A. STOWELL,

*Deputy Commissioner, Garhwal.*

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IN THE COURT OF J. S. CAMPBELL, ESQ., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated October 7, 1909*

SPECIAL REVENUE APPEAL NO. 6 OF 1908-09.

Indra Singh, of village Bindoli, patti Bidalsyu, Garhwal ... *Appellant,*

*versus*

Musammat Chhila of village Guwalkura, patti Choprakt, Garhwal ... ... ... .. *Respondent.*

Appeal against the order by V. A. Stowell, Esq., I.C.S, Deputy Commissioner, Garhwal.

*Held* by Mr. Campbell, Commissioner, that the hissedar of the parent village had no title to dispute the mortagage by a khaikar of his holding in a pakka khaikari village.

ORDER

I see no reason to interfere. It is not disputed that Thapla is a purely khaikari "lagga." Under such circumstances the appellants hissedars of the parent village had no title to dispute respondent's mortgage of her khaikari.

I uphold the Deputy Commissioner's order and dismiss this appeal with costs.

J. S. CAMPBELL,

*Commissioner, Kumaun Division.*

*October* 7, 1909.

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IN THE COURT OF J. S. CAMPBELL, ESQ., C.S.I., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated November* 9, 1910

SPECIAL REVENUE APPEAL NO. 3 OF 1909-10

Bahadur Singh, Autar Singh and Ram Singh of mauza Ubot, patti Kimgaddigad ... *Appellants-Plaintiffs,*

*versus*

Gulab Singh and others of mauza Ubot, patti Kimgaddigad .. ... .. *Respondents-Defendants.*

Appeal against the order of Mr. V. A. Stowell, Deputy Commissioner, Garhwal District, dated July 25, 1910.

Claim for declaration of right over 128 9/16 nalis 5-8-6 revenue-paying land in mauza Ubot under rule 30(3) of the Kumaun Rules.

*Held* by Mr. Campbell, Commissioner, that the village of Ubot was a purely khaikari one up to 1883 and that the status of the resident khaikars was that of under-proprietors. The fact that on different occasions since 1883 the hissedars have obtained small holdings from ignorant khaikars and has them recorded as their khudkasht does not alter the status or rights of the khaikari body.

ORDER

I think that the finding of the lower courts in this case is correct. It is not disputed that the village of Ubot was a purely khaikari one until 1883 and that the status of the resident khaikars was that of under-proprietors and not of occupancy tenants, and that therefore by Kumaun customs the holdings of khaikars, dying without heirs lapsed to the joint body of khaikars, not to the hissedars. The fact that on different occasions since 1883 the hissedars have obtained small holdings from ignorant khaikars and had them recorded as their khudkasht does not alter the status or rights of the khaikari body, who in this case are entitled to the lapsed holding of Lal Singh of which they are in possession.

I uphold the Deputy Commissioner's order and dismiss this appeal with costs.

J. S. CAMPBELL,
*Commissioner, Kumaun Division.*

*October* 7, 1909.

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IN THE COURT OF P. WYNDHAM, ESQ., C.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated September* 19, 1919.

SPECIAL REVENUE APPEAL NO. 6 OF 1919.

Rabi Datt, Ishwari Datt and others of mauza Serabangar, Sabli, district Garhwal ... *Appellants-Defendants.*

*versus*

Umrao Singh, Har Datt and others of Pharsari, Sabli, district Garhwal ... *Respondents-Plaintiffs.*

Appeal against order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated June 24, 1919.

Claim for declaration of khaikari rights in 29/9/16 nalis land.

Held by Mr. Wyndham, Commissioner, that it is impossible for a khaikari holder to hold land as a sirtan or tenant at will in a pakka khaikari village. If he holds lands he must hold as a pakka khaikar so far as the hissedars are concerned.

ORDER.

This is a suit for the determination of the nature of the tenure of the respondents-plaintiffs over 29 9/16 nalis of land over which they are recorded as sirtans of the hissedars, i.e. tenants-at-will, and not as khaikars; they wish to be recorded as khaikars. The first question for determination is whether the village is a pakka khaikari village or not, and this is easy; both courts held that this is the case. Mr. Pauw's settlement records list, shows it as a pakka khaikari village and this village is clearly a pakka khaikar village, and on second appeal this fact can not be disputed.

Having found the village is a pakka khaikari one then the rest is easy. It is impossible for a khaikar holder to hold land as a sirtan or tenant-at-will in a pakka khaikar village if he holds land he must hold it as a khaikar as far as the hissedars are concerned. The whole principle of the pakka khaikari village is that all land which lapses for want of heirs lapses to the khaikars and not to the hissedars and similarly as Sir Henry Ramsay held, unmeasured land cannot be divided among the hissedars.

In fact in a pakka khaikar village it is quite impossible for a khaikar in possession of land to be recorded as a sirtan of the hissedar he cannot

be anything less than a khaikar. The entry made at Mr. Pauw's settlement recording these plaintiffs-respondents as sirtans over the land in suit is an entry which can have no meaning in a pakka khaikari village.

I uphold the findings of the lower courts and dismiss this appeal with costs.

P. WYNDHAM,
*Commissioner, Kumaun Division.*

*September* 19, 1919.

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IN THE COURT P. WYNDHAM, ESQ., C.B.E., C.I.S., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated December* 20, 1919

SPECIAL REVENUE APPEAL NO. 8 OF 1918-19

(1) Rabi Datt, (2) Ishwari Datt, (3) Narayan Datt, (4) Jeet Ram, (5) Budha Ram, and other hissedars of mauza Garhkot, patti Sabli, district Garhwal ... *Appellants,*

*versus*

(1) Chandra Singh, (2) Gaje Singh, (3) Madan Singh, (4) Amar Singh and other khaikars of mauza Garhkot, patti Sabli, district Garhwal... ... ... *Respondents.*

Appeal against the order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated August 20, 1919.

Claim: for determination of the nature of tenure.

*Held* by Mr. Wyndham, Commissioner, that a hissedar cannot become a khaikari of a pakka khaikari village by getting a lapsed holding recorded as his khudkasht, unless he takes actual cultivatory possession of the land or gets it cultivated by an outside tenant. If one of the panch khaikars continues to cultivate it the character of the village does not change and the hissedars cannot get the holding declared as his khudkasht or his khaikari holding.

ORDER

Heard parties.

This is a suit for determination of certain pakka khaikari tenants over a plot of land 63 odd nalis (3 acres) is recorded at settlement as the khudkasht of the hissedars with these khaikar tenants as sirtans for this particular plot.

The tenants sue to have the land declared a khaikari holding and the hissedar is defendant.

Two lower courts find that this village is a pakka khaikar village, but that the land in suit is held by the hissedars as a khaikar and that the tenants hold it from him as sirtan (tenants-at-will.)

There are two patent facts found by the lower courts which I must accept:

(1) That the village is a pakka khaikari village.

(2) That the plaintiffs are khaikar tenants in their village and are in possession of the land in suit. What the nature of the possession over the 63 nalis is the sole point for determination. In Almora it has been held that a khaikari village can lose its status if the hissedar gets possession of sufficient land to destroy the nature of the village when it merges into a kachcha khaikari village and sanjait lands become the property of the panch hissedars. Whether a village is a pakka or kachcha khaikari is a question of fact and depends entirely on how far the hissedar has ousted the khaikar tenants and occupied the village.

But so long as a village is a khaikar tenants' and occupied by the pakka khaikars then the khaikars have the benefit of all sanjait land and the hissedars have not.

In this village it seems that at settlement the hissedar got the settlement officer to record that he was in khudkasht possession of this 3 acres, but that these khaikars were cultivating it as his sirtan tenants.

This is absurd as an entry in a pakka khaikari village. The khaikars when they took over the land had the same status in it as they have in the rest of the village and must be pakka khaikar tenants. The only way in which the hissedar could claim this land to be his khudkasht would have been to enter on it himself or to put in outsider tenants in it, and to do so would have been impossible, the pakka khaikars would have disputed the entry or acquisition by force and would have had public opinion in their favour.

Again it is impossible for a hissedar to be called a khaikar tenant of any land he has been bold enough to seize on and hold himself. It is his khudkasht and if he continues long enough in this course of action and his successors keep it up they destroy and have in Almora destroyed the nature of the village turned into a kachcha khaikari village.

Here the hissedar has been discreet, he has got his name entered as regards this holding in the settlement papers, but has not disturbed the pakka khaikars' possession.

This settlement entry is meaningless. I repeat a pakka khaikar tenant if he holds land in a pakka khaikar village can only hold it as a pakka khaikar.

I hold that this is not the khudkasht of this hissedar for he is not holding it himself nor is he holding it by a foreign tenant. The land is held by one of the panch khairkars as tenant and must be held in khaikari tenure and in no other.

I reverse the order of the lower courts and direct that this holding be declared a pakka khaikari holding and not the khudkasht of the hissedar.

The appeal of the hissedar is dismissed and that of the khaikars is accepted. Costs on the hissedars in both appeals.

P. WYNDHAM,
*Commissioner, Kumaun Division.*

*December* 20, 1919.

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PETITION NO. 2 OF 1919-20

*Copy of Board's order passed in the case of* RABI DATT, *etc. applicants, versus* MUNNO SINGH, *etc. respondent, mauza Bangar, patti Sabli, district Garhwal*

Application for revision of the order of the Commissioner of Kumaun Division, dated September 19, 1919, in the case of declaration of khaikari rights.

*Held* by Mr. Porter, Junior Member, Board of Revenue, that the finding that a village is a pakka khaikari village is one of fact and cannot be questioned on revision.

ORDER

The finding that a village is a pakka khaikar village is one of fact and can not be questioned on revision.

On this basis the Commissioner's findings as to the custom which regulates such cases appears to be correct.

There has been no illegality or material irregularity.

The application is dismissed.

L. PORTER,
*Junior Member.*

*May* 22, 1920.

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IN THE COURT OF P. WYNDHAM, ESQ., C.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated July* 18, 1923

SPECIAL REVENUE APPEAL NO. 5 OF 1922-23

Thagwa and Jwahar Singh, village Bhainswara, patti Saindhar, district Garhwal ... ... ... *Appellants-Plaintiffs,*

*versus*

(1) Rama Nand, (2) Sarbagya Nand, (3) Sangram Singh, (4) Jawahru, (5) Madan Singh, (6) Shankar Datt, (7) Gauri Datt, (8) Tara Datt, (9) Lila Nand, (10) Ganga Singh, (11) Amba Datt, (12) Dayalu, panch khaikars, village Bhaiswara, patti Saindhar, district Garhwal ... ... ... *Respondents-Defendants.*

Appeal against the order of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated January 9, 1923.

Claim for declaration of right in 5619/16 nalis of land (khaikari) under Kumaun Tenancy Rules.

*Held* by Mr. Wyndham that the status of khaikars in a pakka khaikari village is that of under-proprietor; and that a collateral heir succeeds to the deceased khaikar in a pakka khaikari holding according to Hindu law.

ORDER

This is a suit under serial no. 16 Schedule I, Group A, Kumaun Tenancy Rules no. 1626 of January 19, 1918.

The facts of the case are set forth in the orders of two lower courts.

Briefly they are as under:

The village in question is a pakka khaikari village and would more properly be called an under-proprietary village, (*see* page 82, Stowell's Manual).

Kukaria, one of these under-proprietor khaikars, died without direct heirs, he has a cousin (the plaintiff) in the village, also a khaikar under-proprietor, who now claims his holding. The panch khaikars have resisted his claim.

In the first court the plaintiff cousin got a decree for the holding in suit. On first appeal the Deputy Commissioner reversed the decree.

The Deputy Commissioner has got wrong in his facts. It is admitted by both sides that this plaintiff cousin Thaguwa is an under-proprietary khaikar in the village and is not an outsider. The fact remains that he was not in joint cultivation of the holding in suit and it is now for this court to decide the rather important question whether a holding of an under-proprietor khaikar (a person in quite a different status to a kachcha khaikar in hissedari village) will revert to the heirs of the deceased under-proprietor khaikar only to a limited decree (as in occupancy tenure in the plains) or otherwise go to the under-proprietor khaikars, or should revert to the heirs of the under-proprietor khaikar, even though they be collaterals not sharing in the cultivation.

There has been no such question for decision during the last ten years, but before my predecessor Sir John Campbell in the pakka khaikar village of Sirkhet, an exactly similar question arose and he decided that in an under-proprietary khaikari village the holding passes on death without direct heirs to the collateral—even though not in joint possession and not to the panch khaikari body—Special Appeal no. 8 of 1913, decided September 29, 1914.

In spite of a prior Board ruling of 1892, (*see* page 85 of Stowell) and this finding of Sir John Campbell can be followed with confidence; it recognizes that the pakka khaikar is what he always has been, viz. and under-proprietor and not a mere occupancy tenant like the kachcha khaikar.

I accordingly set aside the order of first appellate court and restore the order of the court of first instance and grant the plaintiff a decree with costs in all courts.

P. WYNDHAM,

*Commissioner, Kumaun Division.*

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IN THE COURT OF J. R. PEARSON, Esq., O.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated the 26th January*, 1925

SPECIAL REVENUE APPEAL NO. 22 OF 1923-24

Gulab Singh and others, of mauza Mathchauri, patti Ringwarsyun, district Garhwal ... *Appellants-Defendants,*

*versus*

Thagua and others, khaikars of mauza Mathchauri, patti same ... ... ... *Respondents-Plaintiffs.*

Appeal against order and decree of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated 3rd May, 1924.

To set aside a khaikari right in 120 nalis of land in mauza Naugaon.

*Held* by Mr. Pearson, Commissioner, Kumaun, that mere entry of padhanchari lands as khudkasht of the hissedar at Mr. Beckett's settlement does not amount to declaring the hissedar to be in khudkasht possession of those lands, nor does it affect the status of a pakka khaikari village, unless there has been actual khudkasht cultivation on the part of the said hissedar. Further held that the entry of 120 nalis as khudkasht of the hissedar in 1874 in the revenue papers when the hissedar has not actually been in cultivating possession of the land does not make a suit for declaration of pakka khaikari rights in that land under serial no. 16 of Schedule 1 of Kumaon Tenancy Rules time barred.

ORDER

*See* my order of August 21, 1924. I have found the Deputy Commissioner's remarks about Mr. Beckett's case of 1863 somewhat confusing. For some time, I took them as implying that Mr. Beckett had dealt with this particular holding at the time and whether the Deputy Commissioner had this impression or not I do not make out, but it is certainly incorrect. The case dealt with by Mr. Beckett related to some other land and is only relevant to the question whether the hissedar held any land as khudkasht in the village or not.

With regard to this question it is not easy to interpret the order quoted, as Mr. Beckett says the land was not entered as khudkasht by mistake but at the beginning of his order stated that it was entered as padhanchari, there being no sayanchari land in the village. If he had come to the conclusion that the land was not part of the padhan, or sayanas right but merely khud of the hissedar, it is inconceivable that he

would have not said so, and conclude that the Deputy Commissioner is right in holding that in this case the land was part of the padhanchari land and not mere hissedar's khudkasht. The case does not therefore support the hissedar's claim and admittedly there is no khud land of any sort in the village.

Some further confusion has arisen as to the status of the village. It appears to have been variously described as a lagga of Kameri of which Mathchauri was described as another lagga and as a lagga of Mathchauri itself; but it is at any rate clear that Mathchauri is a pakka khaikari village and Kameri also. There seems strong presumption in favour o the Deputy Commissioner's conclusion that Naugaon was also pakka khaikari.

The Deputy Commissioner barely mentions the entry of 1874 of this land as "khud" of the hissedars. This appears to be the sole entry in their favour. It has been held in numerous cases that such entries in cases where there is strong presumption or proof that the village is exclusively in possession of the khaikars should be viewed with grave suspicion.

It is pointed out in course of the arguments that the actual order apparently refers to the holdings in both Mathchauri and Naugaon. The revenue is given as Rs.5-2. The revenue in Naugaon was only Rs.3-11, in Mathchauri it was Re.1-12, givin total of Rs.5-7. This is approximately the total given in the order. The conclusion would appear to be that the holdings in both villages were to be entered as khudkasht of the hissedars.

But in the case of Mathchauri admittedly there is now no "khud" at all. The village is a pakka khaikari one without question. This strong additional argument is in favour of the Deputy Commissioner.

The suit is by the punch khaikars alleging that the village is a pakka khaikari one, and claiming possession of a holding of 120 nalis against the hissedars. It is common ground that the village (Naugaon) which is a lagga of Mathchauri was given to khaikars some 80 years ago. Mathchauri is undoubtedly still a pakka khaikari village and the question is whether Naugaon has since lost its status.

The question also arises whether the plaintiff's claim is time barred owing to their having lost possession of this particular land to the hissedars long since.

As to this second issue (Assistant Collector's issue 1) though neither court records its decision expresses expressly, it is clear that the Assistant Collector did not take into account the admitted possession for a short time in 1920, when the hissedars sued for recovery of possession alleging that the plaintiffs had recently dispossessed them as tresspassers.

The Deputy Commissioner on the other hand treats the possession in 1920 as evidence of possession as tenants and holds that the cause of action arose in that year when the hissedars sued for possession and obtained a decree for specific relief.

I am unable to decide this appeal which involves the interpretation of old orders about which the two courts differ materially. The wording of Mr. Beckett's appellate order of 1863 quoted is obscure and the order of the original court which was apparently before the Deputy Commissioner is required.

The learned counsel for the respondents has applied for the summoning of certain files which was apparently before the lower courts. These will be sent for. Hearing adjourned till the future date.

J. R. PEARSON,

*August* 21, 1924. *Judge, Kumaun High Court.*

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## IN THE COURT OF A. W. IBBOTSON, Esq., DEPUTY COMMISSIONER, GARHWAL

*Dated December* 4, 1925

REVENUE APPEAL NO. 34

*Instituted on August*, 20, 1925

Pandit Bhola Dutt, Rati Ram, Kamlakant, Raghubar Dutt Suyal of mauza Kamdi, patti Khatliwalla ... *Appellants,*

*versus*

Sarop Singh, Umrao Singh, Khushal Singh, of mauza Kamdai, patti Khatliwalla ... ... ... *Respondents.*

Appeal against the order of Pandit Tika Ram Joshi, Assistant Collector, first class, dated the 4th August, 1925.

*Note*—Kamdai was originally in possession of resident khaikars. About 18 original khaikars bought the hissedari right and became hissedars with their old khaikari holdings as their khudkasht. About 35 or 36 of the old pakka khaikari bodies still remained in possession of their pakka khaikari holdings. The present settlement Muntakhib of 1890–96 shows 88-13-16 nalis as khudkasht of hissedars old and new and 152-1-16 nalis with sirtans of hissedars, old and new.

*Held* by Captain Ibbotson, Deputy Commissioner, Garhwal, that the invasion of the hissedar in the village was not sufficiently extensive to affect the status of the pakka khaikars who have retained their khaikari land.

### JUDGMENT

This is a test case on the vexed subject of the extinction of the pakka khaikari status in villages in Garhwal. In view of the record operations now beginning the matter is of the very greatest importance and this and a second case which has been heard parallel with it have been argued at very great length, and I have received the most ready and persevering co-operation of all the legal practitioners at Pauri in the attempt to get together and examine the authorities on the subject.

The law in this matter is entirely case law and is in the course of evolution.

The disastrous consequences of the confusion in the various applications of the term "khaikar" can hardly be exaggerated as will appear in the course of this judgment.

The accuracy of the historical account of the origin of khaikari tenures given by Mr. Stowell at pages 3 to 6 and 62 to 93 of his Manual of the land tenures of the Kumaun Division is universally accepted.

Before 1862 the slightest successful invasion by a hissedar of pakka khaikari village was sufficient to destroy the pakka khaikari status of the body of khaikars. The period from 1862 of Mr. Pauw's settlement in 1892-96 was a time of considerable confusion which it is necessary to describe.

Mr. Pauw, at his settlement drew up a list (Appendix XI) of his final settlement report which is headed "List of villages in which proprietors had no khudkasht in 1862."

This list has since been accepted by the courts as extremely strong though not absolutely conclusive proof of the status of "pakka khaikari" of the villages mentioned in it. Since that list was drawn up in 1896, the Manual of the land tenures of the Kamaun Division by Mr. Stowell has been published in 1907.

In this Manual Mr. Stowell has discussed the question in all its bearings and enunciated what appeared to him both the correct legal view and the only reasonable view in the equity of the matter. But he could not say that his view was uniformly supported by case law and it does not appear to have been supported with complete uniformity before his Manual was published.

Since the publication of Mr. Stowell's Manual, however, case law has preserved with much greater uniformity the status of pakka khaikari body and of all the judgments produced before me there is only one date since 1923 in which the hissedars have been successful in breaking down the "pakka khaikari" status of a village.

This is an Almora case decided by Mr. Wyndham (Jaman Singh *versus* Chandra Singh) and the village was one in which the "khaikars" were descendants of old "Kainis or Khurnis," i.e. old tenants placed on the land by the grantees, now the hissedars, and not of old proprietors displaced by the grantees. The leading cases on the subject which I have been able to collect are as follows :

*A—In favour of the hissedars*

(1) Manorath and others *versus* Bhairab Dutt.

Finally decided by Mr. Davis, Commissioner, on February 24, 1903. This was Lakhorakot case decided by Mr. Stowell as Assistant Commissioner against the hissedars. Mr. Stowell's decision was reversed by Mr. E. C. Allen whom Mr. Davis, Commissioner, upheld on second appeal.

It was held that the khaikars voluntarily allowed the hissedars to acquire "khud" hissedari rights in the village and thereby the tenure of the village ceased to be wholly khaikari and the hissedars acquired the right to succeed to relinquished land.

(2) Ram Singh and others of Budoli, Almora, *versus* Manga Singh and others.

Decided by Mr. Stowell as Deputy Commissioner, Almora, on August 27, 1930. Mr. Stowell held that a representative proportion of the khaikars had appeared at a mutation proceeding and testified to their acquiescence in the acquisition of hissedari khudkasht rights by the hissedar in 1867. He refused to apply the principle of Debi Dutt *versus* Prem Singh (mentioned below), as fraud or collusion was not proved; and came to the conclusion that the particular land in suit being part of the land previously admitted as under the hissedars direct control either as khudkasht or let to a tenant-at-will, must lapse to the hissedar and not to the khaikari body.

In making this decision he remarks that "the tenants of Budoli and similar villages are really sub-proprietors. Does the acquisition of a small khudkasht holding in a sub-proprietary village convert all the other sub-proprietors into occupancy tenants? I do not see why it should though from the confusion of the term "khaikar" it has I believe been held so. I am not aware of any direct rulings on the point.

(3) Roop Singh and others *versus* Mangal Singh.

Decided by the Board of Revenue, North-Western Provinces and Oudh, February 2, 1904, and mentioned by Mr. Stowell at page 90 of his Manual as follows:

> "In one of the Lakhorakot cases, that of mauza Buranspani, the hissedar did effect his entry openly. The land, which he got one khaikar to relinquish in his favour was actually in possession of another khaikar, Chamla. The latter fought the hissedar up to the Commissioner's Court on the question of mutation, but failed in this as also in a subsequent suit for the land. Seventeen years later at settlement the khaikari community put in a claim for the land, but as Chamla had been holding as a sirtan for 17 years and it was held that the other khaikars must have known of his prolonged struggle for the land, their claim failed by reason of limitation."

(4) Jaman Singh *versus* Chandra Singh, an Almora case.

Decided by Mr. Wyndham, Commissioner, on 29th October, 1923. It was held that the village was before Mr. Beckett's settlement cultivated by sirtan tenants, i.e. kainis or khurnis, and not khaikars. (These two classes were afterwards confused together as khaikars.)

The descendants of these kainis having allowed the hissedars to gain entry and obtain land in his own cultivation, the status of the village became "kachcha khaikari."

In making this decision Mr. Wyndham remarked "the fact that one hissedar has crept into a village cannot be admitted as sufficient to change the status of the whole community. The whole question is one of degree." Mr. Wyndham cited Special Civil Appeal no. 6, Commissioner, Kumaun, 1915 and G. O. no. 1247/VII—448, Judicial Civil Department, November 13, 1915 (this was the case Khushal Singh and others *versus* Trilok Singh on the decision of which by Mr. Wyndham as Commissioner the above remark was based, the G. O. being a refusal by the Government of the United Provinces to follow a special appeal to the High Court).

*B—In favour of the khaikars*

(1) Khushal Singh *versus* Lacchi and others.

Decided by the Board of Revenue, North-Western Provinces and Oudh, May 9, 1888. Held that the holding by a padhan-hissedar of padhanchari land is not a holding of khudkasht and does not therefore break the entity of a pakka khaikari village.

(2) Debi Dutt *versus* Prem Singh.

Decided by Mr. J. R. Reid, Commissioner, January 9, 1889, and mentioned by Mr. Stowell at page 87 of his Manual.

It was held that a hissedar who obtains by fraud or collusion land in a pakka khaikari village is on precisely the same footing as regards rights and privileges as any other khaikar and the land so cultivated is not equivalent to khudkasht, nor does it affect the under-proprietary rights of the other khaikars.

(3) Gauri Dutt *versus* Padmu.

Decided by the Board of Revenue on May 13, 1891.

Held that the mere entry of khudkasht in the name of a hissedar in a pakka khaikari village, when actual possession is not proved, does not change the character of the village.

(4) Sher Singh *versus* Madhu, Garhwal.

Decided by Mr. Macnair as Deputy Commissioner, Garhwal, on July 18, 1895.

Held that, "even if the hissedar gets possession of some khaikari land in any way by collusion or otherwise, he does not beat down the khaikar's right to inherit the property of childless deceased khaikars. He can on such occasions claim no larger share of the deceased's holding, or of the relinquished holding than if he were a khaikar and not a hissedar."

(5) Antar Singh and others *versus* Gulab Singh and others, of Ubot.

Mutation case decided by Mr. Stowell as Deputy Commissioner, on November 19, 1909.

Held that the process followed by the hissedar of getting a "ladawa" and putting the usual nominal sirtan did not change the character of the village.

Appeal from this decision was dismissed on a technical point by Sir John Campbell.

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Decided by Sir John Campbell, on November 9, 1910.

Held that the status of resident-khaikars in a pakka khaikari village was that of under-proprietors. The fact that on different occasions since 1883 the hissedar had obtained small holdings did not alter the status or right of the khaikari body.

Sir John Campbell here upheld Mr. Stowell who was enforcing the principles laid down in his Manual of 1907.

(7) Hari Dutt and others *versus* Rabi Datt and others of Phasari Sabli, Garhwal.

Decided by Mr. Clay as Deputy Commissioner, on June 24, 1919.

Held that where hissedars were recorded under a decree of court, dated 1870, as holding $53\frac{11}{16}$ nalis khudkasht, the status of the village had not been changed. In this case the hissedars had actually obtained physical possession of a portion of the land.

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Decided by Mr. Wyndham, on December 20, 1919.

Held that entry of khudkasht in revenue records in the name of a non-resident hissedar, without his getting actual possession does not change the character of the village.

Mr. Wyndham in making this decision remarked, "again it is impossible for a hissedar to be called a khaikar tenant of any land he has been bold enough to seize and hold himself. It is his khudkasht, and if he continues long enough in this course of action and his successors keep it up, they destroy and have in Almora destroyed the nature of the village and turned it into a kachcha khaikari village."

(9) Gulab Singh *versus* Thaguwa, Garhwal.

Decided by Mr. Pearson, Commissioner, on January 26, 1925.

Held that an entry of khudkasht in favour of the hissedar in a pakka khaikari village does not change the status of the village.

This was a complicated case where there was a good deal of doubt and conflict of opinion as to whether possession was actually held by the hissedars or not.

That a number of these rulings are in conflict cannot be denied. It is I think clear that no. 1, the old case, decided by Mr. Davis, Commissioner, has now been definitely overruled.

Also Mr. Wyndham's *obiter dictum* seems to overrule previous decisions to the effect that a hissedar can acquire pakka khaikari right.

The general principles deducible from the above rulings support and amplify the principle laid down by Mr. Stowell in his Manual as the only equitable basis of decision of such cases but with one important exception mentioned below.

It is now clearly settled law that no mere entry of khudkasht without obtaining cultivating possession by the hissedar and no small invasion even though actual possession be obtained, alters the character of a village.

But Mr. Wyndham, though accepting and enforcing the above, has twice clearly held that a large and sustained successful invasion would change the status of a village and that this would more easily be done in a village in which the khaikars were in origin "kainis" or "khurnis" and not displaced proprietors.

But Mr. Wyndham made no decision as to the position of the dividing line between a large and a small invasion, or between a sustained and a temporary invasion.

Equity would seem to demand that such a dividing line should not exist, and that a body of khaikars should not be subject to a sudden change in the whole tenure of their lands through an action by one or two of their members over which they have no control and which might take place even without their knowledge.

Public policy also appears to demand similarly that such a dividing line should not exist owing to its production of an attitude of enmity and distrust between hissedars and khaikars and to the temptation which it holds out to the former to continue by every underhand trick an invasion once begun and to begin new invasions of pakka khaikari villages, not with the honest intention of buying so much land and holding it, but with the intention of eventually reaching the "degree" at which the whole pakka khaikari right will be destroyed and ensure them an advantage and the khaikars a loss out of all proportion to the value of the land they may have acquired.

Both Mr. Stowell and Mr. Wyndham and the Board of Revenue have clearly re-organized in particular villages that while portions of the village land were in the direct control of hissedars in the remainder of the village the pakka khaikari status was unimpaired (including the succession of the khaikari body to lapsed holdings). These recognitions have destroyed a conception that was previously prevalent, namely the idea that a pakka khaikari village must either be entirely pakka khaikari or must suddenly change wholly to kachcha khaikari.

It must now be admitted that a number of villages are certainly not wholly pakka khaikari, and yet a pakka khaikari body exists in them whose rights to succeed to lapsed holdings indefinite, and up to the present to a major portion of the village are entirely unimpaired.

In such cases it would seem appropriate in equity that the question before the court should rather be whether the particular land in dispute is the subject of pakka khaikari rights, than whether the village is or is not a pakka khaikari one.

As the acquisition of land under various titles increases in these villages, the necessity of such a distinction between different parcels of land in the same village will increase both in urgency and in extent, and similarly public inconvenience will become intolerable if the whole khaikari body is to be dragged into every petty case by the danger of having their tenure suddenly altered through no action of their own and by a transaction entirely out of their control.

There is a further aspect of the matter which is not very distinctly covered by any extent rulings, namely the implications of the fact that khaikari right is not transferable.

It appears to me to follow from this fact that khaikari right is no more transferable to a hissedar than to anyone else. Mr. Wyndham in his remarks referred to in Rabi Datt *versus* Chander Singh no. B-8 above supports this view.

From this it follows that when a hissedar does get cultivating possession in permanency of a pakka khaikari holding, that holding becomes his hissedari khudkasht and not his pakka khaikari holding. He does not in fact with the land acquire any right to be a member of the pakka khaikari body, and the rights of that body ordinarily remain unimpaired. The case law appears to be that the particular land acquired by the hissedar becomes his, to do what he likes with, and is excepted from the ban on transfer; and that it ceases to be a part of the land held in pakka khaikari and a holding in it lapses to the hissedar. But the remaining pakka khaikari body succeeds to all other lapsed holding in the village and the hissedar is not a member of that body.

This condition continues until the invasion becomes so extensive and so sustained as to destroy the pakka khaikari character of the village altogether. Since 1904 no invasion in Garhwal has been held to be of sufficient extent to break the pakka khaikari status of a village, and in the Almora cases that I have been able to obtain the only exception to the same rule has been in one village whose khaikars were kainis in origin.

The desirability from the point of view of both equity and public policy of maintaining this tradition has been explained above. But it is impossible for me to assert that at present such is the law. I am bound to follow Mr. Wyndham's dictum and consider each case on its merits. If a ruling could be obtained with sufficient authority to make it clear that the extent of invasion necessary to break the status of a pakka khaikari body is the extent of the total pakka khaikari land of the village, and this could be made widely known, it would be an unqualified boon to Garhwal.

The following is a summary of the principles which I deduce from the rulings and considerations stated above:

(1) A pakka khaikari village is one in which the hissedar had no actual cultivating possession in 1862.

(2) The list given by Mr. Pauw is extremely strong evidence though not absolutely conclusive on this point.

(3) The mere entry of khudkahst in the revenue papers in favour of a hissadar, without his effecting actual cultivating possession does not change the status of the village.

(4) A successful invasion after 1862, and the acquisition of actual cultivating possession of land by a hissedar, or conversely the acquisition of hissedari rights by a pakka khaikar does not affect the status of the pakka khaikari body in the remaing land of the village, except where the invasion is extensive and sustained.

No criterion has been fixed for the decision of what is " extenssive and sustained invasion." But each case must be considered on its merits.

(5) Hissedar in the course of such an invasion does not become a member of the pakka khaikari body.

I now proceed to apply these principles to the present case. In this case it is admitted that the village was khaikari at Mr. Becket's settlement. The invasion began in 1875, when on the 25th April Dewan Singh, a hissedar got a likhat from some of the khaikars in respect of Chhutura tok giving one-third share of that tok to the hissedar. Mutation was obtained.

Another likhat, dated May 15, 1875, in which all the khaikars except 5 joined, transferred to Dewan Singh Rs.5 revenue-paying sanjait land. I do not make out very clearly exactly what is the meaning of this deed, the theory put before me is that the whole of the village sanjait 100 nalis assessed at Rs.5, and 277 or more nalis of unassessed sanjait were transfered to Dewan Singh, by this likhat. The likhat says that the transferring khaikars will keep their recorded lands but had the rest over to him as he has been paying the revenue for it and if they need it they will ask for it from him. The likhat asserts that it is written with the consent of all the khaikars (" Sabassamian ").

The hissedar did not succeed in getting actual possession until 1886. In that year July the 13th (Revenue Suit no. 279 Dewan Singh *versus* Pattia and others, khaikars, an order was made for Dewan Singh, to be put in possession. This was upheld in appeal by Mr. Rose, Commissioner, who said that the khaikars having agreed to sell could not deny having done so.

There was also a suit with regard to Chhaturatok, judgment, dated February 7, 1887. The panch khaikars sued Dewan Singh and some khaikars who had admitted Dewan Singh's claim to one-third of Chhatura, tok for cancellation of his khudkhast entry in 33, 9/16 nalis (one-third of Chaturatok). The khaikars suit was dismissed. The dispute with regard to possession went on until 1892. In that year Dewan Singh sued for delivery of possession in 277, 10/16 nalis sanjait land (Revenue Suit no. 68, judgment delivered on January 29, 1892; under the deed of May 15,

1875. The Deputy Collector trying the case went to the spot and found outsiders in possession of the land who were tenants of Dewan Singh. The suit was decreed and formal possession was given.

Dewan Singh built his own house in Chaturatok and since then he and his successors have resumed some lapsed holdings. From 1886 onwards the hissedar began to sell his hissadari right to the khaikars and also to give lapsed holdings to old khaikars. Bhola Datt the hissedar concerned in the present case is one of the old khaikars who bought hissedari rights from Dewan Singh, and also bought lapsed khaikari holdings to increase his own hissedari.

This process is exemplified in 1897 when the khaikari holding of Daulatu, etc. lapsed owing to failure of issue. Ganga Singh, son of Dewan Singh (old hissedar) seems to have sold this lapsed holding to Bhola Datt as khaikari on January 7, 1897. Persons representing themselves as heirs of Daulatu objected to this but failed in mutation proceedings, (mutation ordered, dated July 10, 1913). The hissedar being adjudged to be in possession.

There are now about 18 of the original khaikars who have become hissedars and 35 or 36 of the old pakka khaikari body still remain in possession of their pakka khaikari holdings.

The present settlement muntakhib of 1890–96, shows that 88—13/16 nalis is khudkasht of hissadars old and new and 152 1/16 nalis is with sirtans of hissedars old and new.

The present case is a claim by Umrao Singh and Sarop Singh and Kotwal Singh, cousins of Jhankaru a representative of the old pakka khaikars who was killed in the war, for a declaration of right in the holding of Jhankru as his heirs.

They say they were joint with Jhankru and have remained in possession of his holding throughout.

But their legal representative admits that it cannot be proved that they really held a joint interest in the cultivation with Jhankaru and that their succession or otherwise to the holding depends on their position as reversioners in a pakka khaikari holding.

Thus the criterion for deciding the present case is the question whether in this village the status of such as remain of the original admittedly pakka khaikari body has been destroyed or not.

The land in dispute is not a part of any of the various parcels of land which have passed into the direct possession of hissedars. The invasion of the village did not begin until 1875 on paper and 1886 in actual fact.

In these circumstances I am not prepared to allow that the invasion in this village is sufficiently extensive to destroy the status of those pakka khaikars who have retained their khaikari land and I hold that Jhankru is one of these and that the reversioners amongst the khaikari body are entitled to succeed to his holding.

I therefore confirm the finding of the lower court and dismiss the appeal with costs.

A. W. IBBOTSON,
*Deputy Commissioner, Garhwal.*

*December* 4, 1925.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated December* 11, 1926

SPECIAL REVENUE APPEAL NO. 11 OF 1925-26

Bhola Dutt and others, of mauza Kamdai, patti Khatli, district Garhwal ... ... *Appellants-Defendants.*

*versus*

Sarup Singh and others, of the same place ... *Respondents-Plaintiffs.*

Appeal against order and decree of A. W. Ibbotson, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 4, 1925.

Claim for declaration of right in respect of 29 10/16 nalis of land.

In village Kamdai the hissadar held his khudhkasht of 150 nalis only. There is a further holding of 2,015 nalis of the old khaikars who have become khudkasht hissadars of that land by purchase of hissadari rights. *Held* by Mr. Stiffe, Commissioner, that 150 nalis of hissedars khudkasht is not an extensive invasion and does not break the pakka khaikari rights and that the holding as hissedars by purchase by the old khaikars (of 2,015 nalis out of the total cultivations of 2,490 nalis, should be disregarded. When a pakka khaikar buys the hissadari rights in his village he acquires no right to interfere in any way with the management of the village. He remains a member of the pukka khaikari body in which the right to manage the village rests and does not acquire any exclusive right of management.

ORDER

I now have the report of the trial court, dated December 8, supported by the evidence of the Land Record Office. In this it appears that out of a total cultivated land of 2,490 nalis the hissedar holds in his khudkasht 150 only; this is obviously not an extensive invasion. The further point to which I alluded in my order under reference is this, that there is a further holding of 2,015 nalis of the old khaikars, who have now become hissedars, if this 2,015 nalis were considered as an invasion, the invasion might be considered extensive; but I do not hold that the purchase by a member of the pakka khaikari body of the hissedari rights affects the status of the village.

In a pakka khaikari village the only right that the hissedar has is to receive the malikana; and as this is the whole of his right, it is the

only thing that he has to sell. When therefore a pakka khaikar buys the hissedari right in his village, he either compounds for his own malikana; or if the malikana is payable by other khaikars, he buys the right to receive that malikana he acquires no right to interfere in any way with the management of the village. He remains a member of the pakka khaikari body, in which the right to manage the village rests, and does not acquire any exclusive right of management. He can not do so, because his vend- rdid not own that right to sell, I therefore disregard the hissedari holding by some old khaikars of 2,015 nalis, and hold that the invasion of the hissedar to the extent of 150 nalis khudkasht is not extensive, and does not break the pakka khaikari right. The village being pakka khaikari, Sarup Singh and others have the right to the land in suit. I therefore dismiss the appeal with costs.

N. C. STIFFE,

*December* 11, 1926. *Commissioner, Kumaun Division.*

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IN THE COURT OF A. W. IBBOTSON, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*December* 4, 1925.

REVENUE APPEAL NO. 29 OF 1925

Chait Ram and others, village Sankori Bachau Syum ... *Applicants,*

*versus*

Banuwa of ditto ... ... ... *Respondent.*

*Held* by Captain Ibbotson, Deputy Commissioner, Garhwal, (1) a pukka khaikari village is one in which the hissedar has no actual cultivating possession in 1862; (2) The list given by Mr. Pauw is extremely strong evidence though not absolutely conclusive on this point; (3) The mere entry of khudkasht in revenue papers in favour of a hissedar without his effecting cultivating possession does not change the status of the villages; (4) A successful invasion after 1862 and acquisition of actual cultivating possession of land by a hissedar, or conversely, the acquisition of hissedari rights by pakka khaikars does not affect the status of the pakka khaikari body in the remaining land of the village, except when the invasion has been extensive and sustained.

ORDER

This is a test case on the vexed subject of the extinction of the pakka khaikari status in villages in Garhwal. In view of the record operations now beginning the matter is of the very greatest importance and this and a second case which has been heard parallel with it have been argued at very great length and I have received the most ready and persevering co-operation of all the legal practitioners at Pauri in the attempt to get together and examine the authorities on the subject.

The law in this matter is entirely case law and is in the course of evolution.

The disastrous consequences of the confusion in the various applications of the term khaikar can hardly be exaggerated and will appear in the course of this judgment.

The accuracy of the historical account of the origin of khaikari tenures given by Mr. Stowell at pages 3 to 6 and 62 to 93 of his Manual of the Land Tenures of the Kumaun Division is universally accepted.

Before 1862 the slightest successful invasion by a hissedar of pakka khaikari village was sufficient to destroy the pakka khaikari status of the body of khaikars. The period from 1862 to Mr. Pauws' settlement in 1892–96 was a time of considerable confusion which it is unnecessary to describe.

Mr. Pauw at his settlement drew up a list Appendix XI of his final settlement report which is headed "List of villages in which proprietors had no khudkasht in 1862."

This list has since been accepted by the courts as extremely strong though not absolutely conclusive proof of the status of "pakka khaikari" of the villages mentioned in it. Since that list was drawn up in 1896, the Manual of the Land Tenures of the Kumaun Division by Mr. Stowell has been published in 1907.

In this Manual Mr. Stowell has discussed the question in all its bearings and enunciated what appeared to him to be both the correct legal view and the only reasonable view in equity of the matter. But he could not say that his view was uniformly supported by case law, and it does not appear to have been supported with complete uniformity since before his Manual was published.

But since the publication of Mr. Stowell's Manual, case law has preserved with much greater uniformity the status of pakka khaikari bodies, and of all the judgments produced before me there is only one dated October 29, 1923, in which the hissedars have been successful in breaking down the "pakka khaikari" status of the village.

This is an Almora case decided by Mr. Wyndham—Jaman Singh *versus* Chandra Singh—and the village was one in which the "Khaikars" were descendants of old "Kainis" or "Khurnis" old tenants placed on the land by the grantees, now the hissedars and not of old proprietors displaced by the grantees. The leading cases on the subject which I have been able to collect are as follows :

*A—In favour of hissadar*

(1) Manorath and others *versus* Bhairab Datt.

Finally decided by Mr. Davis, Commissioner, on February 24, 1903. This was Lakhorakot case decided by Mr. Stowell as Assistant Commissioner against the hissedars. Mr. Stowell's decision was reversed by Mr. E. C. Allen which Mr. Davis, Commissioner, upheld on second appeal.

It was held that the khaikars voluntarily allowed the hissedar to acquire " Khud Hissadari rights in the village and thereby the tenure of the village ceased to be wholly khaikari and the hissedars acquired the right to succeed to relinquished land.

(2) Ram Singh and others *versus* Mangal Singh and others of Budoli, Almora.

Decided by Mr. Stowell as Deputy Commissioner, Almora, on August 27, 1903. Mr. Stowell held that representative proportion of the khaikars had appeared at a mutation proceeding and testified to their acquiescence in the acquisition of hissedari khudkasht rights by the hissedar in 1887. He refused to apply the principle of Debi Datt *versus* Prem Singh mentioned below as fraud or collusion was not proved and came to the conclusion that the particular land in suit being part of the land previously admitted as under the hissedar's direct control either as khudkasht or let to a tenant-at-will must lapse to the hissedar and not to khaikari body.

In making this decision he remarks that " the tenants of Budoli and similar villages are really sub-proprietors. Does the acquisition of a small khudkasht holding in a sub-proprietary village convert all the other sub-proprietors into occupancy tenants? I do not see why it should though (from the confusion of the term " khaikar " it has I believe been held so). I am not aware of any direct rulings on the point.

(3) Roop Singh and others *versus* Mangal Singh.

Decided by the Board of Revenue, on February 2, 1904 and mentioned by Mr. Stowell at page 90 of his Manual as follows : "In one of the Lakhorakot cases, that of mauza Buranspani the hissedar did effect his entry openly. The land, which he got one khaikar to relinquish in his favour was actually in possession of another khaikar, Chamia. The latter fought the hissedar up to the Commissioner's court on the question of mutation, but failed in this as also in a subsequent suit for the land. Seventeen years later at settlement the khaikari community put in a claim for the land, but as Chamia had been holding as a sirtan for 17 years and it was held that the other khaikars must have known of his prolonged struggle for the land, their claim failed by reason of limitation.

(4) Jaman Singh *versus* Chandra Singh, an Almora case.

Decided by Mr. Wyndham, Commissioner, on October 29, 1923. It was held that the village was before Mr. Backett's settlement cultivated by sirtan tenants, i.e. kainis or khurnis, and not khaikars. (These two classes were afterwards confused together as khaikars.)

The descendants of these kainis having allowed the hissadars to gain entry and obtain land in his own cultivation, the status of the village became " Kachcha khaikari ".

In making this decision Mr. Wyndham remarked, " the fact that one hissadar has crept into a village cannot be admitted as sufficient to change the status of the whole community. The whole question is one of degree " Mr. Wyndham cited Special Civil Appeal no. 6,

Commissioner, Kumaun, 1915 and no. 1247/VII—448, Indian Civil Department, November 13, 1915 (this was the case of Khushal Singh and others *versus* Trilok Singh on the decision of which by Mr. Wyndham as Commissioner the above remark was based on the Government order being refusal by the Government, United Provinces, to allow a special appeal to the High Court).

*B—In favour of the khaikars*

(1) Khusal Singh
*versus*
Lachhi and others.

Decided by the Board of Revenue, North-Western Provinces and Oudh, on May 9, 1888.

Held that the holding by a padhan hissadar padhan chari land is not holding of khudkasht and does not therefore break the entity of a pakka khaikari village.

(2) Debi Datt *versus* Prem Singh.

Decided by Mr. J. R. Reid, Commissioner, on January 9, 1889 and mentioned by Mr. Stowell at page 87 of his Manual.

It was held that a hissedar who obtains by fraud or collusion land in a pakka khaikari village is on precisely the same footing as regards rights and privileges as any other khaikar and the land so cultivated is not equivalent to khudkasht, nor does it affect the under-proprietary rights of the other khaikars.

(3) Gauri Datt *versus* Padamu.

Decided by the Board of Revenue on May 13, 1891. Held that the mere entry of khudkasht in the name of a hissedar in a pakka khaikari village, when actual possession is not proved does not change the character of the village (Sher Singh *versus* Madhu, Garhwal.)

Decided by Mr. Macnair as Deputy Commissioner, Garhwal, on July 18, 1895.

Held that even if the hissedar gets possession of some khaikari land in any way by collusion, or otherwise he does not beat down the khaikars' right to inherit the property of childless deceased khaikars. He can on such occasions claim no larger share of the deceased's relinquished holding than if he was a pakka khaikar and not the hissedar."

(5) Antar Singh and others *versus* Gulab Singh and others of Ubot, Sainar, November 19, 1909.

Held that the process followed by the hissedar of getting a "Ladawa" and putting in the usual nominal sirtan did not change the character of the village.

Appeal from this decision was dismissed on a technical point by Sir John Campbell.

(6) Bahadur Singh and others *versus* Gab Singh and others. Decided by Sir John Campbell, on November 9, 1910.

Held that the status of resident khaikar in a pakka khaikari village was that of under-proprietors. The fact that on different occasions since 1883 the hissedar has obtained small holding did not alter the status or rights of the khaikari body.

Sir John Campbell here upheld Mr. Stowell who was enforcing the principles laid down in his Manual of 1907.

(7) Hari Datt and others *versus* Rabi Datt and others of Pherasari Sabli, Garhwal.

Decided by Mr. Clay as Deputy Commissioner, on June 24, 1919.

Held that where hissedars were recorded under a decree of a court, dated 1870 as holding 53/11/16 nalis khudkasht, the status of the village had not been changed. In this case the hissedars have actually obtained possession of a portion of land.

(8) Rabi Datt and others *versus* Chandra Singh, Garhwal. Decided by Mr. Wyndham, on December 20, 1919.

Held that entry of khudkasht in revenue records in the name of a non-resident hissedar without his getting actual possessions does not change the character of the village.

Mr. Wyndham in making this decision remarked, "again it is impossible for a hissedar to be called a khaikar tenant of any land he has been bold enough to seize and hold himself. It is his khudkasht, and if he continues long enough in this course of action and his successors keep it up, they destroy and have in Almora destroyed, the nature of the village and turned it into a kachcha khaikari village.

(9) Gulab Singh *versus* Thaguwa, Garhwal.

Decided by Mr. Pearson, Commissioner, on January 26. Held that an entry of khudkasht in favour of the hissedar in a pakka khaikari village does not change the status of the village.

This was a complicated case where there was good deal of doubt and conflict of opinion as to whether possession was actually held by the hissedars or not.

That a number of these rulings are in conflict cannot be denied. It is I think clear that no. A-1 the old case decided by Mr. Davis, Commissioner, has now been definitely overruled.

Also Mr. Wyndham's *obiter dictum* seems to overrule previous decisions to the effect that a hissedar can acquire pakka khaikari right.

The general principles deducible from the above rulings support and amplify the principle laid down by Mr. Stowell in his Manual as the only equitable basis of decision of such cases but with one important exception mentioned below.

It is now clearly settled law that no mere entry of khudkasht without obtaining cultivating possession by the hissedars and no small invasion even though actual possession is obtained, alters the character of a village.

But Mr. Wyndham, though accepting and enforcing the above, has twice clearly held that a large and sustained successful invasion would change the status of a village and that this would more easily be done in a village in which the khaikars were in origin "Kainis" or "Khurnis" and not displaced proprietors. But Mr. Wyndham made no decision as to the position of the dividing line between a large and a small invasion, or between a sustained and a temporary invasion.

Equity would seem to demand that such a dividing line should not exist. And that a body of khaikars should not be subject to a sudden change in the whole tenure of their lands through an action by one or two of their members over which they have no control and which might take place even without their knowledge.

Public policy also appears to demand similarly that such a dividing line should not exist owing to its production of an attitude of enmity and distrust between hissedars and khaikars and to the temptation which it holds out to the former to continue by every underhand trick an invasion once begun and to begin new invasions of pakka khaikari villages, not with the honest intention of buying so much land and holding it but with the intention of eventually reaching the "degree" at which the whole pakka khaikari right will be destroyed and ensure them an advantage and the khaikars a loss out of all proportion to the value of the land they may have acquired.

Both, Mr. Stowell and Mr. Wyndham and the Board of Revenue have clearly recognized in particular villages that while portions of the village land were in the direct control of hissedars yet in the remainder of the village the pakka khaikari status was unimpaired including the succession of the khaikari body to lapsed holdings. These recognitions have destroyed a conception that was previously prevalent, namely the idea that a pakka khaikari village must either entirely remain pakka khaikari or must suddenly change wholly to kacheha khaikari.

It must now be admitted that a number of villages are certainly not wholly pakka khaikari, and yet a pakka khaikari body exists in them whose rights to succeed to lapsed holdings in a definite and up to the present in the major portion of the village are entirely unimpaired.

In such cases it would seem appropriate that enquiry by the courts should rather be as to whether the particular land in dispute is subject of pakka khaikari rights, than whether the village is or is not a pakka khaikari one.

As the acquisition of land under various titles increases in these villages the necessity of such a distinction between different parcels of land in the same village will increase both in urgency and in extent. And similarly public inconvenience will become intolerable if the whole khaikari body is to be dragged into every petty case by the danger of having their tenure suddenly altered through no action of their own and by a transaction entirely out of their control.

There is a further aspect of the matter which is not very distinctly covered by any *extant* rulings, namely the implications of the fact that khaikari rights are not transferable.

It appears to me to follow from this fact that khaikari right is no more transferable to a hissedar than to any one else. Mr. Wyndham in his remarks referred to in Rabi Datt *versus* Chandra Singh no. B. 8 above supports this view.

From this it follows that when a hissedar does get cultivating possession in permanency of a pakka khaikari holding, that holding becomes his hissadari khudkasht and not his pakka khaikari holding. He does not in fact with the land acquire any right to be a member of the pakka khaikari body, and the rights of that body ordinarily remain unimpaired. The case law appears to be that the particular land acquired by the hissedar becomes his, to do what he likes with, and is expected from the ban of transfer. It ceases to be a part of land held in pakka khaikari and a holding in it lapses to the hissedar. But the remaining pakka khaikari body succeeds to all other lapsed holdings in the village and the hissedar is not a member of that body.

This condition continues until the invasion becomes so extensive and so sustained as to destroy the pakka khaikari character of the village altogether. Since 1904 no invasion in Garhwal has been held to be of sufficient extent to break the pakka khaikari status of a village, and in the Almora cases that I have been able to obtain the only exception to the same rule has been in one village whose khaikars were kainis in origin.

The desirability from the point of view both equity and of public policy of maintaining this tradition has been explained above but it is impossible for me to assert that at present such is the law I am bound to follow Mr. Wyndham's dictum and consider each case on its merits. If a ruling could be obtained with sufficient authority to make it clear that the extent of invasion necessary to break the status of a pakka khaikari body is the extent of the total pakka khaikari land of the village, and this could be made widely known, it would be an unqualified boon to Garhwal.

The following is a summary of the principles which I deduce from the rulings and considerations stated above :

(1) A pakka khaikari village is one in which the hissedar had no actual cultivating possessions in 1862.

(2) The list given by Mr. Pauw is extremely strong evidence though not absolutely conclusive on this point.

(3) The mere entry of khudkast in the revenue papers in favour of a hissedar, without his affecting actual cultivating possessions does not change the status of the village.

(4) A successful invasion after 1862 and the acquisition of actual cultivating possession of land by a hissedar *right* by a *hissadar* and conversally, the acquisition of hissedar rights by a pakka khaikar does not effect the status of the pakka khaikari body in the remaining land of the village where the invasion is extensive and sustained.

No criterion has been fixed for the decision of what is " extensive and sustained invasion " but each case must be considered on its merits.

(5) A hissedar in the course of such an invasion does not become a member of the pakka khaikari body.

I now proceed to apply these principles to the present case. The present case in Sankrori village is an attempt by the hissedars to eject one Banuwa whom they assert to be a sirtan but he asserts that he is a pakka khaikar and not liable to ejectment.

The history of the quarrel is as follows:

Previous to Mr. Beckett's settlement the village was held by three khaikars Akhlu, Thobi and Bali. Akhlu and Bali were always quarrelling and in the critical year of 1862 (18 Pus) Sambat 1919) Bali left the village and gave a ladawa to the hissedars—Madhu, Ganga Ram and Lokeshwar of his 48 nalis of land.

This ladawa was evidently brought to Mr. Beckett himself for there is a note in Mr. Beckett's own handwriting in the *taberag* in Hindi " Bali chhorke chala gaya—ap khata."

The hissedars were then shown as holding khudkasht in Bali's share by Mr. Beckett himself, evidently at the instance of Bali and the hissedars.

It is certainly not proved that the hissedars then obtained any actual possession and the first proof of their possession is when they obtained a regular dakhal as the result of a partition in 1876.

From that time onwards the invasion seems to have continued and by the time of Mr. Pauw's settlement the hissedars are shown in the Muntakhib as having 58 nalis khudkasht and 58 nalis in their immediate control through sirtans.

It may be remarked (though of little importance), that the hissedars had a little padhanchari land in this village before Mr. Beckett's settlement.

The position is thus as follows:

Hissedars had—

(1) Padhanchari land 12 nalis before Mr. Beckett's settlement entry of khudkasht in 1862 over 48 nalis but not actual possession,

(2) Actual possession of small parcels of land from 1876 onwards, and

(3) By 1892, 58 nalis of khudkasht and 58 nalis held by their tenants-at-will recorded in Mr. Pauw's settlement, actual possession doubtful.

Under these circumstances I have no hesitation in holding that the pakka khaikari status of the khaikari body in this village has not been destroyed.

It is not proved that the hissedars have ever obtained actual cultivating possession of the present land in dispute, but on the other hand it has remained constantly in the hands of pakka khaikaris.

In these circumstances the pakka khaikar in possession cannot be ejected as a sirtan.

I therefore confirm the finding of the lower court and dismiss the appeal with costs.

A. W. IBBOTSON

*December* 4, 1925. *Deputy Commissioner, Garhwal.*

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IN THE COURT OF N. C. STIFFE, Esq., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION.

*Dated the 5th August*, 1926.

SPECIAL REVENUE APPEAL NO. 15 OF 1925-26.

Chait Ram, Maya Ram and Tara Dat of village Sankrori, patti Bachansyun, district Garhwal ... ... *Appellants-Plaintiffs,*

*versus*

Banuwa of the same village ... ... ... *Respondent-Defendant.*

Appeal against order and decree of Captain A. W. Ibbotson, M.C., M.B.E., I.C.S., Deputy Commissioner, Garhwal, dated the 4th December, 1925.

Claim for ejectment of tenant from 9, 4/16 nalis in mauza Sankrori.

*Held* by Mr. Stiffe that actual cultivation by hissedars since 1876 of about 56 nalis and residence in the village since, cannot destroy the status of pakka khaikari village (this is the leading case on the subject).

ORDER

Chait Ram sues for the ejectment of Banuwa in village Sankrori which may or may not be a pakka khaikari village. The success or failure of the claim depends on this issue. We have to discuss what is and what is not a pakka khaikari village.

There is no codified law in Kumaun and the question rests entirely on case law and on the opinion which Mr. Stowell has expressed on the subject. Mr. Stowell was never in a position to issue rulings as Commissioner but is universally accepted as the authority on the rent law of Kumaun. I would first refer to Mr. Stowell's remarks at the bottom of page 84 of his Manual, in which he states that it is entirely wrong, when once a hissedar has obtained a khudkasht footing in a village to treat the whole character of the village as changed. As he stated elsewhere, it is obviously unjust that the status of the whole body of khaikars should be changed through the action of possibly one member of that body over whom the other members have no control. A good many revenue authorities of the division seem to have recognized this principle as just, but have not had the courage to break away from a practice sanctioned by many rulings, that any invasion of the village by the hissedar is liable to alter the status of the village. The latest rulings of importance are by Mr. P. Wyndham, who laid it down that an "extensive and continuous"

invasion is required to break the status of the village; but he maintained that it was a question of degree and failed to suggest any criterion by which the question could be decided.

To the proposition that it must be a question of degree and that there must be a possibility of breaking the status of the village, I agree. To take the extreme case, one can imagine a pakka khaikari village almost entirely ruined, in which the khaikars wished to undertake no further responsibilities and absconded. To bind the zamindar to the khaikari body under such circumstances would be absurd. On the other hand I am convinced that the khaikari body requires more protection than they have up to date received.

So far as I can see there are only two ways in which these pakka khaikari villages have originated one is the case of grant made over the heads of the original cultivators, in which case the pakka khaikar corresponds almost exactly to the under-proprietor of Oudh. Such under-proprietors undoubtedly call for protection. As Mr. Stowell remarks, if one under-proprietor in an Oudh talukdari relinquishes his holding no one would even suggest that the other under-proprietors in the village should be thereby prejudiced. The second case seems to me to be illustrated in the village now in suit. I take it that in the old days the position was very much like the position in the Tarai and Bhabar Estates at the present moment. Government looked for the most solvent and influential man in the neighbourhood, settled certain villages with him and encouraged him to acquire tenants. The hissedar, thus created, probably had several villages and already had his home in a settled village. He found tenants for the other villages and arranged with them, or it was arranged for him by Government that they should pay him certain dues and cultivate and manage the village. It was not therefore the hissedar who risked his money or expended his labour on reclaiming waste land but it was the body of tenants. The same proposition is probably true in the case of some laggas: the lagga is occasionally pakka khaikari, having been established by the khaikars without the help of the hissedar: while the village itself is partly cultivated and managed by the hissedar; in it the khaikars are kachcha. The tenants of the new village or lagga earned their privileged status by their energy and enterprise. We now come to the question whether the hissedar has any right, when the village has been established to come in and claim to share the privileges incidental to an established village. I see that Mr. Stowell says on page 3 with reference to pakka khaikars of the other class that it would appear that if the grantee did not at once exercise his right to take part of the village into his own immediate cultivation, he was subsequently debarred from getting footing there at all and remained entitled merely to his manorial due. This seems to me a very reasonable principle on which to treat the rights of the hissedar in pakka khaikari villages or laggas established on the other basis. If the landlord is content to play the part of an absentee landlord and take no share in the management of the village over a term of years, I fail to see why he should be allowed to come in at a later stage, when the village is established, reap the fruits

of other person's energy and enterprise. It appears to me therefore that Mr. Wyndham's dictum of " extensive and sustained invasion " should in every case be interpreted to the benefit of the khaikari body : and only in the most extreme case such as I have suggested above to the benefit of the hissedar. So long as the khaikari body are able and willing to manage their own affairs the hissedar should not be allowed to interfere with them. (Sir Henry Ramsay, quoted on page 85 ; Stowell.)

It now remains to consider whether the village now in dispute is or was a pakka khaikari village. I agree with the Deputy Commissioner's first proposition, that *prima facie*, a pakka khaikari village is one in which the hissedar had no actual cultivating possession in 1862. I take it that the date was chosen because there was a settlement that year and there is no doubt that the actual date should be considered with discretion. In this case it is clear that the village was cultivated by a small khaikari body of three until that year, when one member of the body gave a ladawa to the hissedar whether the transaction was *bona fide* in view of his quarrels with the khaikars or whether he colluded with the hissedar is uncertain and immaterial. I take it that the village was not entered in Mr. Pauw's list, purely on the ground that the hissedar was as a matter of fact recorded at the settlement as occupying land. I note that Mr. Pauw's list is headed " list of villages in which proprietors had no khudkasht in 1862 " and not " list of pakka khaikari villages " from which it is clear that he was merely recording facts and not drawing inferences from the same. This view of the nature of the list confirms the view admittedly held that the list is presumptive evidence only of the nature of the village and is not conclusive as to the existence or non-existence of a pakka status. In view of what I have said above, as to the essence of the criterion being the existence of a cultivation and managing hissedar or of an absentee landlord, I entirely agree with the Deputy Commissioner's 3rd and 4th propositions.

The extent of the successful invasion in the present case is summed up in the last paragraph of the Deputy Commissioner's judgment and it most clearly does not reach the criterion which I have laid down.

I therefore dismiss the appeal with costs.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

*August* 5, 1926.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S.,
COMMISSIONER, KUMAUN DIVISION
*Dated August* 4, 1926
SPECIAL REVENUE APPEAL NO. 16 OF 1925-26

Gopal Datt and others, hissedars and muafidars, mauza Pokhri, patti Chalansyun, Garhwal ... ... *Appellant-Defendants,*

*versus*

Dewan Singh and others, Panch Khaikars of Milai, Kandarsyun, Garhwal ... ... ... *Respondents-Plaintiffs.*

Appeal against the order and decree of the Deputy Commissioner, Garhwal, dated January 30, 1926.

*Held* by Mr. Stiffe, Commissioner, that though Milai and Barsuri were granted to muafidars as a special grant or jagir, still the village is pakka khaikari village, in which the khaikars are entitled to all lapsed holdings.

Claim for declaration of right with possession to establish the khaikari rights in 60/2/16 nalis of land which defendant got recorded as their khudkasht.

ORDER

This is a suit by the panch khaikars of Milai village to have settlement entry of khudkasht land set aside in 60 nalis of land. The status of the village has been in dispute for many years, and both the lower courts have been so busy discussing this point that they have failed to deal with the status of the actual land in dispute. A part of this land is the land in dispute in the litigation referred to on pages 86 and 87 of Mr. Stowell's Manual.

The status of the village is peculiar. In fact Mr. Clay has stated in some of the many suits referring to it, that there are only two other villages in Garhwal held on the same tenure. The village was granted to the present muafidars by Raja Praduman Sah by deed of gift, which definitely granted the whole village. . . . In other words the village and all that is in it, whether nap or benap. Government confirmed the grant on the original terms and are no longer the owner of the benap as they are in most other villages in the hills. It is clear from the history of the village that there were zamindars of the village before the grant was made, and this is as clear as a case of under-proprietory right as is possible. There is no doubt therefore that the village is pakka khaikari village. I agree, however, with Mr. Mason and other officers, who have had to settle dispute concerning the benap land, that the customary rights of the panch khaikars in a pakka khaikari village are circumscribed by the peculiar terms on which the jagirdars hold. It is clear that Government cannot give or recognize the rights which they have given to pakka khaikars in other villages, in benap in this village in which they have given the benap away. In other respects such as lapsed holdings, inheritence, etc. the village is pakka khaikari.

We now come to the particular 60 nalis in suit. This was recorded by Mr. Pauw as the khudkasht of the jagirdars. I cannot believe that in a fighting village like this such an entry could have been made surreptiously; had the khaikars been in cultivating possession of this land at the time when the entry was made, I have not the slightest doubt that they would have contested the case to the utmost, in view of the aforementioned rights recognized, and recorded by Government.

The khaikars apparently base their claim on certain oral evidence that goes to show that they are in cultivating possession of some of the land, and that they hold other parts of the land through sirtans, and it is argued that this being so they cannot be anything else except khaikars on the land. The evidence on the record is too vague to enable me to hold that they do hold this land in khaikari tenure, and I therefore refuse to alter the settlement record.

At the same time I should like to make clear the effect of this decision on the status of the village which I have already held to be pakka khaikari. I have said that the evidence as to the actual cultivating tenure of the plaintiff khaikars in these particular plots of land is too vague to prove their claim : but there is very definite evidence by two patwaris to show that the jagirdars have not themselves been in cultivating possession. There is also evidence to show that the sirtans pay their dues to the khaikars, and not to the jagirdars. It is clear therefore that viewed as an invasion of a khaikari village, the position shown by the settlement record is purely fictitious; there has been no such effective invasion. In a case of an under-proprietory tenure of this sort it would take a very extensive and sustained invasion to alter the status of the village. The point having been finally entered into and decided, the hissedars are advised to enter into friendly relation with the khaikars, draw their malkana, and put an end to this litigation. If they do not, they will reap little benefit from their property. In the event therefore, the appeal is decreed with costs.

N. C. STIFFE,

*Commissioner, Kumaun Division.*

*August* 4, 1926.

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PETITION NO. 12 OF 1925-26

*Copy of Board's Order passed in the case of* DEWAN SINGH, *applicant* versus GOPAL DATT, *respondent, mauza Pokhri, patti Chalansyun, district Garhwal*

Application for revision of the order of the Commissioner of Kumaun Division, dated August 4, 1925, in the case of declaration of right.

*Held* by Mr. Oakden, Junior Member, Board of Revenue, that the muafidar was not in possession of the land in dispute, and that it had wrongly been recorded as the muafidar's khudkasht. He was not entitled to the lapsed holdings of the khaikari of Milai as Milai was pakka khaikari village like those of which revenue goes to the Government.

ORDER

This is an application for the revision of an order passed by the Commissioner of Kumaun, reversing the concurrent findings of the Deputy Commissioner and Assistant Collector of Garhwal.

The suit was brought by the khaikars of Milai against the muafidar for a declaration that they have khaikari rights in 60 nalis of land, which they claimed was in their possession.

The Assistant Collector found that the village was a pakka khaikari one, that plaintiffs were in possession of the land and were entitled to the declaration. The Deputy Commissioner upheld his decision in a well-reasoned judgment but the Commissioner, on the strength of the entry of the land as khudkasht at the last settlement, reversed these decisions and held that the land was khudkasht, though he found that the muafidars neither cultivated it themselves nor received rent from the sirtans and in fact that they were not in possession.

It is urged that the Commissioner's order is unsupported by evidence and that its effect will be to reduce the village from the status of pakka khaikari to that of kachcha khaikari.

I will deal first with the second point. The Commissioner states definitely that there will be no such effect, but appellant's fears are not without justification, so long as courts accept the unsound doctrine that the successful invasion of khaikari right in a pakka khaikari village can lead to the permanent reduction of the status of all the khaikars.

The respondents' arguments also show that the effect disclaimed by the Commissioner will be claimed by them. They go further and urge that the khaikari rights are confined to the area actually cultivated by them and that they have no rights outside those circumscribed limits. It thus becomes necessary owing to the claims of both sides to deal with the situation in the village.

The position in Milai is a peculiar one. The village is held as muafi by respondents whose title rests on a grant made in 1792, by the Raja of Tehri transferring to their ancestor, a priest, all the rights enjoyed by him. This grant does not appear to have been formally recognized by the British Government but there has been practical recognition though it has never been complete. Thus Government has conceded the right of the muafidar to the revenue, but has never recognized the right to asses that revenue, though such a right was undoubtedly included in the grant. The muafidar also owns the hissedari rights, as decided at the first settlement.

Thus they are both muafidars and hissedars and in the latter capacity are limited to the rights ordinarily enjoyed by hissedars and in the former to such rights as are conceded by Government.

I should explain here that in Kumaun all unoccupied lands and forests belong to Government, that the people are allowed to bring under cultivation lands in the neighbourhood of their existing cultivation on which revenue is assessed at the next settlement, that they are not allowed to start cultivation, in a new place without permission, and that in granting such permission Government consider the rights of user of people of the same or of adjoining villages who object that their customary rights will suffer from the new cultivation.

Now Government have in practice admitted the rights of the muafidar to the forests of Milia, i.e. as against forest officers, their value was

refunded to him, but they have never recognized that the muafidar had any rights which lessened the rights of the khaikars, or took away from them any of the privileges ordinarily enjoyed by the khaikars of a pakka khaikari village. It would be carrying recognition to absurd limits to hold that the grant of 1792, gave the muafidar rights which Government itself does not exercise. In other words the only real differences between Milai and other pakka khaikari villages is that Government have given up some of their rights to muafidar and that as regards their exercise the muafidar is in the position of Government. The muafidar does not occupy a position superior to that occupied by Government in other pakka khaikari villages, and the rights of the khaikars are not inferior to those enjoyed by khaikars in such villages.

I quite agree with the Commissioner as to the respect which should be shown to settlement entries but in this case there is overwhelming evidence that the entry is wrong:

(1) As regards possession, all three courts agree in holding that the muafidars are not in possession, and their findings on this point are final.

(2) In the first settlement the khaikars were recorded as hissedars, but their status was reduced to that of khaikars on appeal. This shows their paramount position and makes it extremely improbable that the muafidars would be able to obtain an entry and acquire khudkasht.

(3) Milai is in the list of villages in which the proprietors had no khudkasht in 1862.

(4) The most striking proof of the wrong entry is to be found in the Settlement Officer's own words. On page 45 of his report Mr. Pauw cites Milai as an instance of a village in which owing to the absence of any written law on the subject of these (khaikari) tenures, and to the unscruplousness and untruthfulness of litigants authorities are apt to give decisions opposed to all recognized rights. He goes on to say that Milai is held entirely by khaikars who pay revenue to the muafidar, that at the previous settlement the khaikars were recorded as proprietors owing to their independent position and he pronounces as "perfectly preposterous" the claims put up by the muafidar to khudkasht rights in certain lands broken up by a khaikar, though the former "by some means or other" obtained a decree.

In the face of these strong and definite views it is impossible to believe that the same Settlement Officer could have recorded any land in Milai as khudkasht.

For the above reasons, I hold that respondents are not in possession of the land in dispute and are not entitled to khudkasht rights in it and that the khaikars of Milai have all the rights enjoyed by khaikars in pakka khaikari villages in which the revenue goes to Government.

I would therefore reverse the order of the Commissioner, and restore that of the Assistant Collector with costs in all courts. Pleader's fees Rs. 30.

R. OAKDEN,
*Junior Member.*

*September* 19, 1927.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated August* 4, 1926

SPECIAL REVENUE APPEAL NO. 14 OF 1925-26

(1) Bairagi and (2) Chandra Singh, of mauza Kalgaddi, patti Bali Kandarsyun, district Garhwal ... *Appellants-Plaintiffs,*

*versus*

(1) Musammat Saraswati, (2) Pancham Singh, (3) Daulat Singh, of mauza Banekh, patti Kandarsyun, district Garhwal ... ... ... *Respondents-Defendants.*

Appeal against order and decree of Lala Prem Lal Sah, Personal Assistant to Deputy Commissioner, Garhwal, dated February 8, 1926.

Claim for cancellation of a deed of relinquishment, dated May 29, 1925, and declaration of khaikari right over 54/14/16 nalis in mauza Kalgaddi.

*Held* by Mr. Stiffe, Commissioner, that the entry of 8/16 nali of khudkasht at Beckett's settlement without actual possession did not affect the pakka khaikari status of the village.

ORDER

In this case the panch khaikars of Kalgaddi (a lagga of Banekh) sue to set aside a relinquishment made to the hissedars by one of their number, on the ground that the village is a pakka khaikari one, and that no relinquishment can be made to the hissedar but that any such holding should lapse to the panch khaikars. The only issue is whether the village is pakka khaikari or not. The village is not in Mr. Pauw's list, because at Mr. Beckett's settlement the hissedars had half a nali khudkasht recorded. I notice that the cultivated area of the village was 91 nalis. The hissedars live 5 miles away. This small plot of land is recorded either as without a tenant, or as cultivated by the resident khaikars. This is the first case that I have had in which the question of the original status of pakka khaikari has been raised. The more usual question is of invasion of an admittedly once pakka khaikari village. I would refer to my finding in Chet Ram *versus* Banua, of the 5th instant, in which I have discussed the origin of pakka khaikari villages at some length. I

take it that this is a very perfect example of the second class of pakka khaikari village; in which the tenants are not under-proprietors, but are entitled to manage their own affairs without the interference of the hissedar, on the ground that the hissedar is an absentee landlord, and has never done anything for them. Adhering to the general view which I took in that case I hold that the fact that the hissedar managed to get 1/40th of an acre recorded as his khudkasht at Beckett's settlement, does not alter the obvious fact, and that the village therefore is a pakka khaikari one. I, therefore, accept the appeal with costs and cancel the relinquishment and the sale-deed.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

*August* 4, 1928.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated August* 8, 1927

SPECIAL REVENUE APPEAL NO. 17 OF 1926-27

Rup Singh and 37 others, of mauza Walla Ghanyal, patti Malla Chaukote, district Almora ... ... *Appellants-Plaintiffs,*

*versus*

Mohan Singh and others of the same place ... *Respondents-Defendants.*

Appeal against order and decree of H. Ruttledge, Esq., I.C.S., Deputy Commissioner, Almora, dated April 9, 1927.

Claim for a declaration to the effect that the entire village Ghanyal Malla is pakka khaikari one and they are entitled to possession on the land shown in the revenue papers as khud.

*Held* by Mr. Stiffe, that in a claim for a declaration to the effect that the entire village is pakka khaikari and that the plaintiff khaikars are entitled to the possession of the land shown in revenue papers as khud, when there is no possible doubt that the invasion has been so extensive and sustained, that the original status of the village has clearly been changed, it is hardly worthwhile dealing with all the overt acts of hissedars; as the case is clearly barred by limitation.

ORDER

This is a case in which we start with a pakka khaikari village Ghanyal Malla; but the admirable judgment of the trial court, Mr. Niblett, who has marshalled the whole facts of the case with greatest care, leaves us no possible doubt that the invasion has been extensive and sustained; so much that it is clear that the original status of the village has been changed. It is really hardly worthwhile dealing with all the overt acts of the hissedars as the case is clearly barred by limitation. One of the

first causes of action that I find was in 1882, the surrender of khaikars; and after that Mr. Niblett has dealt with about half a dozen instances in which the hissedars have exercised hissedari rights in a way which would have been impossible in a pakka khaikari village. I need only allude to the order of Sir Henry Ramsay, in which he entrusted certain land that was left vacant to the padhan of the village, that is the hissedar's padhan. It is inconceivable that Sir Henry Ramsay would have taken this action if at the time he had regarded the village as a pakka khaikari village. He most strongly maintained that the hissedar had no *locus standi* in such a village. The plaintiffs have not a leg to stand on; and the appeal is dismissed with costs.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

*August* 4, 1926.

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## ALLAHABAD HIGH COURT

MISCELLANEOUS CASE NO. 289 OF 1928

*Dated January* 7, 1929

*Present*: MR. JUSTICE SEN *and* MR. JUSTICE NIAMATULLAH.

Gaje Singh and others ... ... ... *Petitioners,*

*versus*

Musammat Uchabia and others ... ... *Opposite-party.*

*Held* by Sen and Niamat Ullah, J., that collaterals of a deceased khaikar in a pakkka khaikari village are not debarred from succeeding to his share by reason of their not being joint in cultivation with him or his widow. Held further that the mere fact that the khaikari rights of a pakka khaikar are not transferable is not enough to invalidate a mortgage as between the mortgagee and mortgagor. The only persons who can impeach it are the panch khaikars.

JUDGMENT

*Niamatullah, J.*—This is a reference by the Local Government under rule 17 of the Rules and Orders, relating to Kumaun Division, made on the petition of Gaje Singh and others who were plaintiffs in a suit brought by them to challenge the validity of a mortgage-deed, dated August 18, 1925, executed by Musammat Uchabia, widow of Govind Singh, in favour of Kalyan Singh, and Tika Singh, defendants nos. 3 and 4, in respect of property to which she had succeeded on the death of her husband without issue, a few years before the date of the mortgage. The relationship of the plaintiffs with the deceased husband of Musammat Uchabia will appear from the subjoined pedigree.

NOTE—The pedigree is given in the original judgment.

The suit as brought is simple. The plaintiffs claim to be the nearest reversioners and presumptive heirs of Gobind Singh, on the death

of Musammat Uchabia. The alienation is impeached on the usual ground that it was not warranted by such legal necessity as justifies a mortgage by a widow under the Mitakshara form of the Hindu Law, defendant no. 4 has been impleaded as having attested the mortgage-deed, probably, in token of the same having been executed under extenuating circumstances. The plaintiffs do not suggest that they formed with the deceased a joint Hindu family.

Written statement filed by the mortgagees (defendants nos. 2 and 3) raised two main questions, viz., (1) that the property mortgaged, consisting of lands in a subdivision of the village Sirda and a cowshed is part of pakka khaikari tenure in which plaintiffs, as separated collaterals, can have no right of inheritance and, therefore, by themselves and without joining all other co-sharers of the entire tenure they cannot maintain the suit and (2) that the mortgage was justified by legal necessity as shown by the attestation of defendant no. 4, a person equally entitled with the plaintiff.

The Assistant Collector of Ranikhet who heard the case in the first instance upheld both the pleas. On first appeal, the Deputy Commissioner, and on second appeal the Commissioner, decided only the first plea and expressed no opinion on the second which related to the existence or otherwise of legal necessity for the mortgage effected by the widow. In arriving at a conclusion on the question of the plaintiff's right to inherit on the termination of the life estate of defendant no. 1 all the three courts considered that it was to be decided in accordance with a certain decision which has ruled that collaterals are not entitled to succeed to khaikari tenure unless they were joint in cultivation with the deceased tenant.

Dissatisfied with the decisions of the Kamaun courts the plaintiffs moved the Local Government to make a reference to the High Court for the latter's opinion on the questions arising in the case, one of which is of general importance and likely to arise in other cases. This reference has been accordingly made.

It may be stated at once that the first plea does not relate to any family or local custom modifying the ordinary Hindu Law to which the parties are subject in matters of inheritance but refers to a peculiar incident of the khaikari tenure which, according to the defendant's case, is lineally heritable but cannot descend on the collaterals unless they were joint in cultivation with the last male holder or his widow. The judgments of the courts whose decisions are questioned are based on that footing. The earlier decisions which the courts profess to follow likewise treat it as an incident of the tenure and not as part of the personal law of the holders.

Whether the tenure in the hands of a male holder is transferable to any extent need not be considered but it may be safely presumed that it is a permanent tenure and the holder thereof enjoys absolute immunity from ejectment by the proprietor. That it is not limited in duration to one or more lives will be equally clear from such mate-

rials as are available. It is admittedly heritable by the male lineal descendants. Indeed, the defendants' written statement and the judgments of the courts which uphold it unquestionably imply that the male holder has an estate of inheritance but that collaterals as such cannot inherit, but the whole body of co-sharers in the khaikar tenure. Such being the characteristic of the tenure as alleged by the defendants and found by the courts the whole controversy boils down to the question whether the tenure being heritable, collaterals, not sharing in the cultivation of a deceased holder, are excluded from inheritance by the whole body of co-sharers in the particular tenure. It may be observed that the collaterals as such are excluded but can apparently succeed if they are co-sharers in the whole tenure.

It must be conceded that an incident of such an extraordinary character, attaching to an estate of inheritance and so much opposed to ordinary notions of natural justice should be established by cogent evidence. Cases of hardship may frequently occur now when separation between the sons of the same father and between uncle and nephew is common enough.

Now, an incident of the kind mentioned above may come into existence in one of three ways, viz. (1) by statute, (2) by the terms of the grant creating the tenure, or (3) by Kumaun custom.

It was in A.D. 1815 that Kumaun was annexed to British India by conquest. The first settlement was very summary, the second was for one year, the third and fourth for three years each, the fifth and seventh for five years each. The last of these expired in about 1828 (*sic* 1823). All these settlements were made by Mr. Traill whose long official connexion with the Kumaun region entitled him to be regarded as an authority where his pronouncement on a question relating to land tenures in Kumaun is to be found. He is freely quoted by succeeding Settlement Officers and Mr. Stowell has made copious and frequent use of his writing. The next settlement and the first long-term (20 years) settlement was concluded by Mr. Batten in 1840. On the expiry of this term it was followed by another similar settlement made by Mr. Beckett (1861–64), but before he could write his report he had to proceed to England owing to ill-health and Sir Henry Ramsay, the Commissioner, compiled the report of that settlement. The third long settlement was made in about 1896 by Mr. Pauw whose report is very illuminating and has been made full use of by Mr. Stowell. (I have collected the above information from the report of Mr. Pauw, pages 55–58.) It will thus appear that we must depend on Messrs. Traill, Batten, Beckett, Sir Henry Ramsay and Mr. Pauw for guidance as regards the incidents of a given tenure in Kumaun and any one who has had to write on that subject or to decide any question in controversy has relied on the views of one or the other of these officers.

An idea of khaikar tenures and rules of succession relating thereto, as also a general conception of the relations subsisting between the proprietors and Government on the one hand and between the

proprieorts and their subordinate holders on the other can be obtained from the following extracts taken from Sir Henry Ramsay's and Mr. Pauw's settlement reports which are largely based, so far as the characteristics of the said tenure and rules of succession are concerned. Mr. Traill's writing I was not able to procure any compitation of Mr. Traill himself.

"The khaikar," says Sir Henry Ramsay, "enjoys hereditary though not a transferable right in the land of cultivators; and on the death of a father the sons generally make a sub-division of the land, which not unfrequently reduces the holding of each so much that these khaikars are obliged to cultivate other land as sirtans or in paekashtee in some distant village, where they make their own term with the proprietor, paekashts of longstanding have now assumed the position of khaikars. No paekashts are in the position of contractors or sirtans.

"There is no tenure corresponding to what which is known on the plains as zamindari. Where muafi rights which had been undisturbed since the conquest of the province existed, they invariably include the proprietary right, and the cultivators are only khaikars. Where proprietary rights which were recognized at the 20 years' settlement or rights of the same kind acquired by purchase existed could they not be interfered with but, with these exceptions, the cultivators have been recorded as the owners of the land they occupy, while the permanent tenants can never be disturbed or interfered with by the enhancement of rent. In fact these tenants are in all respects equal to proprietors, with this exception that they cannot sell their holding and they pay a small sum in addition to the quota of revenue due from the land recorded in their names, sirtans must make their own arrangements.

"The only other tenure requiring notice is that which exists in some parts of the district. Where whole villages are in possession of the permanent tenants khaikars. The proprietor residing in another part has no power to interfere with these khaikars or their land, waste or cultivated."—(*Sir Henry Ramsay's Settlement Report* of 1875, pages 15 and 16.)

Mr. Pauw quoting from Mr. Traill gives the following account of khaikari tenures:

"Where the land granted," says Mr. Traill, "was already held in property by others, those occupant proprietors, if they continued on the estate, sank into tenants of the new grantee, who, moreover, by the custom of the country, was permitted to take to one-third of the estate into his own immediate cultivation or sir. Of the remainder of the estate, the right of cultivation rested with the original occupants, who were now termed khaikars or occupants, in distinction from thatwan or proprietor." In Nagpur there are a number of villages illustrative of this system, the high castes Bartwals, Bhandaris, Rawats, etc., no doubt the more recent grantees, being the proprietors of the whole village with cultivating rights in part only, while the Khasia caste, no doubt the earlier occupants hold the remainder of the village as khaikars of the high caste proprietors. It

would appear that if the grantee did not at once exercise his right to take part of the village into his own immediate cultivation, he was subsequently debarred from getting a footing there at all, and remained entitled merely to his manorial dues. Mr. Batten derives the word khaikar from khana, to eat, and kar the royal revenue, that is, he may enjoy the land so long as he pays the revenue. Besides the Government revenue (sitri) the khaikar was called on to pay to the proprietor various dues known as blent (special cash payments) dastur (dues in kind) and pithai (an annual trifling cash rent).

"The Khurnis were tenants and settled on the estate by the proprietors, and by long continued occupancy might come to be considered in the light of khaikars from whom indeed they differed little except in the nature of the rent to which they are liable. "As the Khurni or Kaini according to Mr. Traill paid a higher rent than any other description of tenant it was no doubt found convenient to allow him an herditary right to cultivation though strictly this right belonged only to the khaikar. The land of the childless Khurni would, moreover, naturally revert to the proprietor at his death, and this may not improbably be the reason why the khaikar, who in villages where the grantee forbore to take cultivating possession in the beginning, now entirely excluds his heirs, so that on a khaikar in such a village dying without an heir or even collateral, his land reverted to the village body of khaikars, should he die in village where the proprietor holds land in cultivating possession, the holding passes not to the body of khaikars but to the proprietor. The analogy of position between khaikars and khurnis would probably have been quite sufficient to establish this custom. Mr. Batten says regarding the khurnis: "This class of tenants is fast becoming merged into that of khaikars." It seems doubtful whether during the period of British rule they were ever distinguished, as no mention is made of khurnis in the oldest settlement papers they appear, to have been treated exactly as khaikars, and certainly not only is no distinction, made now, but the very name is lost, and it would be impossible to find out whether any given khaikar acknowledged for his ancestor a vassal tenant, or a reduced occupant proprietor. Sir Henry Ramsay, however, is said to have acknowledged a distinction between pakka and kachcha khaikars, having reference, no doubt to the under-proprietary and occupancy rights discussed in this paragraph; and in a settlement dispute relating to Mangaon patti Dug in the Almora District decided by Pandit Amba Datt, Deputy Collector, in A.D. 1843 the same technical expression 'pakka khaikars' is used.

"The hissedari right is as before mentioned said to have been an introduction of the British rule. The idea of land without a private owner seems to have been repugnant to the earliest British Administrators and as in the plains the proprietary right was conferred on the zamindars, or revenue collectors, so in Garhwal it was conferred on the occupant cultivators unless some one else could show that a grant of the land and not merely an assignment of the revenue, had been made to him. The cultivators were then termed hissedars or co-sharers

in the estate, and were allowed full rights of transfer in the cultivated land of the village."

(Pauw's Settlement Report, 1898, pages 33–35, paragraphs 37, 38 and 40).

"Another kind of resident tenants" however, says Mr. Traill "who rent the land which the proprietors from absence or other causes are precluded from cultivating themselves, have no right of occupancy, either acknowledged or prescriptive. The tenants pay their rent either in kind kut commonly at one-third of the produce or in money, according to existing rates or engagements or to former usage. Where there is little demand for the land it is usually let for a moderate money rate, which tenure is termed sirtan, that is the renter pays merely sirti." The term sirti meant the Government land revenue proper under the Rajas, the original "agricultural assessment."

(Pauw's Settlement Reports, page 35, paragraph 41).

It should be borne in mind that the word hissedar has become a technical expression denoting only proprietary co-sharers.

"At the outset a distinction must be made between khaikars in a village held entirely by khaikars, and khaikars in a village in which the hissedars have khudkasht which is the modern form which the under-proprietory and occupancy rights have respectively assumed. In the former case (to quote Mr. J. R. Reid's words in case of Padmu and others of Timlilagga Pali, Khatli *versus* Gauri Datt and another in an order, dated March 28, 1889 as Commissioner), the khaikars alone have a right to arrange for the cultivation, pasturage, etc., including the succession to land lapsing owing to the death of heirless of khaikars, the breaking up of waste, etc. while the hissedars have no right beyond the collection of revenue cesses and padhanchari." It would be hardly necessary to give instances, by quoting cases, of such a well-known and well-established principle were it not that owing to the absence of any written law on the subject of these tenures, and to the unscrupulousness and untruthfulness of litigant new authorities are apt merely from inability to ascertain the correct custom, to give, all decisions absolutely opposed to recognized rights. It is sufficient to give one such instance. The village of Milai is held entirely by khaikars, who pay revenue to the muafidar. At the last settlement the khaikar who represent the old cultivators who has sunk into tenants of the grantee were recorded as proprietors in consequence of their independent position. On appeal they were subsequently reduced to the position of khaikars. But there could be no question of their under-proprietary right or the fact of their holding the whole village. Balmukand, the present muafidar, sued a khaikar Lal Mani for recovery of possession of land broken up by the latter on the ground that it was his khudkasht (a perfectly preposterous plea); a similar suit had in fact been dismissed in 1888 and by some means or other got a decree. The defendant in appeal pleaded that the whole village was in possession of khaikars, and that the muafidar by custom could only take the malikana and had no right to interfere with the

cultivation. The Commissioner, however, refused to modify the decision (May 5, 1893) and an appeal to the Board of Revenue met with the same fate (September 2, 1893) though in the case of Padmu *versus* Gauri Datt quoted above, the Board had themselves decided that the khaikars in a similar village were entitled to the possession of land which the hissedars had actually partitioned out amongst themselves. The cases Khushal Singh of Dyuna Talla Dora *versus* Lachi and others (June 8, 1889) and Gangapuri of Mangaon, Dug *versus* Parsi Sah (December 20, 1893), both of which went up at one time or another to the Board are perhaps the leading cases on the subject of the holdings of khaikars in villages held entirely by khaikars. Both are Almora cases and in both the custom was held to apply not only to principal but also to lagga villages held entirely by khaikars when there was any evidence that the khaikars holding represented an old under-proprietory tenure. They both refused to the hissedar the right at to resume the land of an heirless khaikar and in both cases it was decided that the land should go to the common body of khaikars. The principle is, however, by no means a modern one. Sir Henry Ramsay mentions it in the Settlement Report of Kumaun and a judicial decision by him to the same effect exists in Harak Singh of Chyurkot Sabli *versus* Dalip Singh and another of Jukani Lagga of Bangar Sabli in which the hissedars wanted to divide among themselves the unassessed land and unassessed waste land of the village Jukani held entirely by khaikars Sir Henry Ramsay ruled 'since all Jukani is in possession of khaikars the unmeasured land will not be divided amongst the hissedars' (November 30, 1877) In the case of Banwa and another *versus* Bala Datt of Rauthiya Chalansyun in a which the defendant a hissedar got a deed of relinquishment from khaikar in village held entirely by khaikars and the plaintiff a khaikar sued for the land, Mr. Ross, Commissioner, ruled—'The hissedar cannot get possession of any khaikar land. If a khaikar wishes to give up any of his land it must go to the other khaikars.' It was also ruled that the hissedar had no right to cultivate unmeasured land in the village (April 9, 1883). Nor does the hissedar improve his position by obtaining by fraud or collusion the cultivating possession of land in the village. It has been laid down in the case of Devi Datt *versus* Prem Singh and others, decided by Mr. J. R. Reid, Commissioner, on January 9, 1889, that a hissedar so obtaining land is on precisely the same footing as regards rights and privileges as any other khaikar, and that the land so cultivated is not equivalent to khudkasht nor does it affect the under-proprietary rights of the other khaikars.

"In the case of villages in which the hissedars have land in their own cultivation or khudkasht, the khaikar's land, in the event of his leaving no heir, or collateral in cultivating possession, reverts to the proprietor. This reversion was noted in the last settlement agreement, though not the reversion to the body of khaikars. In the case of Ude Singh in 1876 this matter was discussed between Mr. Colvin, the officiating Commissioner, and Mr. Backett, the latter explaining that the agreement was a 'mere form.'" The khaikar may also relinquish his land at any time by

a deed of relinquishment (*ladawa*) executed in favour of his landlord, but not to the prejudice of his partners in the holding. Thus in the case of Chhoti *versus* Jiva Nand of Uprainkhet, Bachhonsyun, the plaintiff, widow of a deceased khaikar sued to cancel a *ladawa* given by her eldest son to the hissedar defendant, as she had a younger son Sir Henry Ramsay ruled: "If Paunlya did not wish to cultivate the land, his younger brother had the right to all, and Paunlya had no right to give it up by ladawa." The deed of relinquishment was accordingly cancelled (September 4, 1878).

As regards the right of relatives to succeed no doubt has ever been expressed as to the son's right. The daughter's right is more doubtful though in the case of Musammat Sauni and another *versus* Prasadu and others, Pauri. patti Nandalsyun, the plaintiffs used to succeed their mother as khaikars, and got a decree which was upheld by Colonel Erskine on appeal (May 19, 1890). In former case a nephew had been preferred to a daughter and a daughter's son, even when the latter were supported by the proprietor, while still earlier cases had declared the nephew incapable of succeeding at all; facts which only show the necessity for a clear exposition of existing rulings. The daughter's right is no doubt a highly equitable one, and would apply *à fortiori* in the case of a Gharjawain and daughter's son, though it can hardly be said that the rights of either are generally recognized. The fact is that nine out of every ten hillmen are hissedars, and every curtailment of the right of succession to the khaikar is to their advantage, as it brings in more lapsed holdings which can now be let out as far better profit than 20 per cent. on the revenue. As regards heirs other than descendants, the widow has an undoubted claim to succeed in the absence of sons, and in this is preferred to the daughters. In the case of Rattan Singh *versus* Dhanukalu and others of Sirwana Iriaakot, the plaintiff hissedar sued to obtain land from the defendants cultivating on behalf of the deceased khaikars widow. Sir Henry Ramsay ruled "while the wife of a deceased khaikar is alive this claim is inadmissible" (May 9, 1872). Collaterals as a rule are only allowed to succeed if they share in the cultivation of the holding (i.e. are what is known as shikmi). There are no definite rulings on the subject by Mr. J. R. Reid has expressed his opinion that section 9 of Act XII of 1881 might fairly regulate succession in this case. The right of an adopted son to succeed would not be worth noticing were it not that it was denied in several cases by Mr. Ross while Commissioner. Sir Henry Ramsay, however, in the case of Kamrup *versus* Narain Singh Kirkhu, Mawalsyun (February 1, 1882), clearly upheld the right of an adopted son to succeed, and in the cases of Sri Ram and another *versus* Gaje Singh of Bhawain, Khatsyun (September 9, 1892), and Kirpa Ram of Ghiri Kaphelsyun *versus* Kedaru (August 1, 1894), this view has been reaffirmed, succession by relatives other than those mentioned can take place with the consent of the co-sharer but not otherwise but this may be regarded rather as a renewal of the khaikari right than a continuation of it. (Pauw's Settlement Report, 1898, pages 45, 46, paragraphs 49 and 50).

"The khaikari right is only heritable, not transferable." This was definitely laid down by Colonel Fisher, as Commissioner, in the case of Suraj Singh versus Amardev and others, Gurasyun (February 2, 1885), page 47, paragraph 51).

"The ejection of khaikars can only take place on a decree of court which is usually only made in case of proved inability to pay the assessment, for instance non-satisfaction of a decree for rent. It thus happens that the ejection of khaikars is almost unknown. The hissedar is also very cautious in interfering with a khaikari holding unless armed with *tadawz* as it generally ends in his being mulcted in cost." (Pauw's Settlement Report, page 48, paragraph 51).

Mr. Stowell had succinctly described the khaikar tenures, their origin and incidents in Chapter III of his Manual and defines a khaikar as "a permanent tenant with a heritable but non-transferable right in his holding and paying a rent fixed at settlement which cannot be altered during the currency of a settlement." He says in a footnote that the heritable and non-transferable character of the tenure was recognized by Mr. Traill as far back as 1829.

It will appear from these extracts that persons holding under the proprietors or hissedars are roughly divisible into two main classes, viz. (1) khaikars and (2) sirtans or tenants-at-will, khaikars who are ex-proprietors fall into two categories: (*a*) Pakka khaikars who hold the entire village in which the proprietor has no khudkasht and can only recover land revenue and manorial dues from khaikars and (*b*) kachcha khaikars who hold part of the village, the remaining portion being cultivated by the proprietor entitled to recover rent from khaikars who, otherwise, have a permanent tenure. The word "under-proprietor" has been used to denote the former of the last two but it is materially different from the under-proprietary tenure in Oudh, which is heritable and transferable in all respects and is recognized as full ownership. There is absolutely nothing in the origin of these tenures to justify the assumption that only a restricted right of inheritance exists. As a rule a permanent tenure not limited to one of more lives is fully heritable. It is quite clear that from Mr. Traill down to Mr. Pauw all Settlement authorities recognize that a khaikar tenure is heritable without qualification of reservation of any kind and a question of its lapsing would only arise on total extinction of heirs. The earliest indication that we can trace of the collaterals (who are undoubtedly heirs under Hindu Law) being excluded is found in an opinion of Mr. J. R. Reid the Commissioner (noted at page 46 of Mr. Pauw's Report) who considered that section 9 of Act XII of 1881 "might fairly regulate succession in this case." This must have been in or about 1889 when he was Commissioner of Kumaun Mr. Pauw quotes an earlier case Suraj Singh *versus* Amerder (February 2, 1885) in which khaikar's right was described as "heritable" not transferable. Mr. Pauw pointed out in noting the opinion of Mr. Reid, that "there are no definite rulings on the subject which

suggests that he was not in accord with Mr. Reid's view based on analogy drawn from section 9, Act XII of 1881.

Revenue officers who administered justice in civil cases in Kumaun based their judgments on the equities of each case as it arose and in many instances their decisions were not strictly according to Hindu law, see for example cases of daughter, nephew and even adopted son noted by Mr. Pauw at page 46 of his report. They are so conflicting that no rule can be deduced from them, Indeed they do not profess to be based on any rule but on the circumstances of individual cases.

In deciding the case under reference the Kumaun courts considered themselves bound by the decision of the Commissioner in the case of Upan Deo versus Bachi Singh of Thala, Manral Malla Salt (dated July 18, 1892), I have not been able to get full copy of the judgment but portions of it given at page 85 of Mr. Stowell's book show fairly clearly that the question in that case related to the right of hissedar to a lapsed tenure as against the body of khaikars in a pakka khaikari tenure and a reference is also made to the rights of collaterals. The relevant passage is this. The custom of Kumaun is believed to be as alleged (that is says Mr. Stowell (as regards the hissedar's not succeeding). But under the custom it is understood that collaterals have no prior title to lapsed khaikari lands; such lands lapse to the khaikari community." No evidence of the alleged custom is referred to. How it was understood " or believed " to exist is not indicated. I am inclined to think that this halting expression of opinion is only an echo of the view previously expressed by Mr. Reid to which reference has already been made and which is based on an analogy drawn from the provisions of Act XII of 1881. The decision in Upan Deo's case appears to have been accepted by courts subordinate to the Commissioner in some subsequent cases and copies of judgments in two of such cases are on the file. One of these is the judgment of Mr. Dible, Assistant Commissioner, first class, dated November 20, 1915, which quotes the judgement of Mr. J. S. Campbell in Special Civil Appeal no. 3 of 1913, Tili versus Bhawan Singh, etc., Mr. Campbell ruled that in this individual case the plaintiffs have failed to prove any custom by which land in the possession of a khaikar in a purely khaikari village passes on his death without direct heirs, to the Panch Khaikars rather than to *collaterals not in joint possession with him at the time of his death.*" Mr. Campbell underlined the words which I have italicised in the passage quoted above probably to indicate that he enunciated no general rule. This has introduced a further complication, viz. that in some pakka khaikar tenures the collaterals do succeed. Accordingly the view adopted by Mr. Dible and presumably by other officers was that there exists a presumption that collaterals not joint in cultivation with the deceased cannot succeed but that evidence in a given case may show that they have such a right.

If a question of burden of proof arises and it will arise if a special custom excluding collaterals from inheritance as regards a permanent tenure is pleaded the party pleading such a custom must have the onus laid on it to prove by satisfactory evidence that such collaterals though

heirs under the personal law of the deceased tenant in respect of all other assets left by him were excluded from inheritance as regards his rights in khaikari tenure. Generally speaking, proof of a custom of exclusion in such cases should consist either (1) of evidence showing that the sovereign authority while granting proprietary rights to others, imposed a condition on the resulting khaikar tenure that collaterals not joint in cultivation would not succeed in the event of a khaikar dying without a lineal male descendant and widow or (2) of evidence of usage ancient, uninterrupted, uniform and certain, of exclusion of collaterals, such as is considered sufficient in law to override the ordinary law to which the parties may be subject. I have already pointed out that the rule of succession to a permanent tenure heritable in its character, is in the absence of a statute, terms of grant, if any or valid and binding custom to the contrary, is the same as is applicable to other properties left by a deceased tenant.

It seems to me that Kumaun courts which excluded the collaterals in certain cases were either under a misapprehension as regards the right of inheritance possessed by a separated collateral under Hindu Law, taking it for granted that separation so far affects his status as to make him a total stranger, or considered that the law as laid down in section 9, Act XII of 1881, should be applied as an equitable rule in the absence of a custom specifically referring to rights of collaterals. It was not however, accepted by officers of standing without demur. I have already referred to the remark of Mr. Pauw in reference to the view of Mr. J. R. Reid, Mr. Stowell has likewise commented on it and urged its re-consideration. He says "As regards succession by heirs of a deceased khaikar the same rules have been observed as in the case of khaikars in mixed villages. Thus only a limited class of heirs can claim to succeed. This is evidently on the analogy of the "occupancy tenant" position of the khaikar in mixed villages. It is inequitable on the under-proprietary theory and remembering the special character of these communities. Succession, in these cases it would seem reasonable should be regulated by the ordinary rules of Hindu Law as in the case of hissedars.

"In the case of Upan Dep *versus* Bachi Singh of Thala Manral Malla Salt (order of July 18, 1894), the Board applied the rule excluding collaterals from any claim to succeed as of right, to a wholly khaikari village, but the ruling is not a very positive one. From the phrases used in this decision it would seem that the Board were rather tentatively accepting a view of the case than laying down a decisive ruling. The custom of Kumaun is "they say "believed to be as alleged, i.e. as regards the hissedars not succeeding." But under the custom it is understood that collaterals have no prior title to lapsed khaikari lands ; such lands lapse to the khaikari community "otherwise I have found no rulings laying down specifically that the same rules must apply to cases of inheritance in the villages as are applicable to khaikars in mixed villages. There seems, therefore, to be some room for an unfettered consdieration of the question by the higher courts (page 85).

It is possible to make an attempt to defend the view of Kumaun Courts on the ground that the whole community of khaikars in a village hold the lands as a corporate body, rights of individuals not being recognized, so that if a sole tenant dies, land cultivated by him goes by survivorship to the whole body of remaining khaikars. Such a theory is far fetched and no indication in support of it can be discovered in any settlement report or judgments of courts. On the contrary a tenure of such a character excludes all rights of inheritance and will admit of only survivorship, firstly, in favour of shares in the cultivation and failing them in favour of the entire khaikar community of the village. In that view a separated son or other male lineal descendant will be in no better position than a collateral and yet the unqualified right of a son and other male lineal descendants, separate or joint, is conceded on all hands, rights of individual holders *inter se* are recognized which militate against such a theory. Reports are full of references to partition and where division of land is permitted, compensating one co-sharer at the expense of another will be very often inevitable. This, again, will negative the existence of what would be, technically speaking, joint tenancy belonging to a corporate body as distinguished from a tenancy in common held by a few individuals. I must, therefore, dismiss this line of argument. I have mentioned and examined it because the opposite-party is unrepresented.

The only other question that called for decision was whether, assuming the plaintiffs are competent to question the mortgage made by defendant no. 1 in favour of defendants nos. 2 and 3 the same is valid and binding. The mere fact that the tenure is not transferable is not enough so invalidate it as between the mortgagee on the one hand and the mortgagor or those bound by her actions on the other. The decisive factor, therefore, is whether the mortgage was justified by legal necessity. The Assistant Collector in disposing of issue no. 5 says :

" Both parties have adduced evidence on this issue. It is admitted by both parties that Govind Singh's property was self-acquired and it is also proved from defendant's evidence that he built a number of retaining walls and also a big compound wall and a house and cow-shed. He must have spent a lot of money. Defendent no. 4 Mohan Singh is also collateral of the deceased, Govind Singh. He is a witness to the mortgage-deed which is in favour of outsider. In the deed the rukka executed by Govind Singh is mentioned. The total amount of mortgage may have been exaggerated but it looks probable that Musammat Uchabia did take a loan to pay up legal debts and expenses. In view of decision of issue no. 2 against the plaintiff, this issue is not of much importance. This issue is decided in the affirmative. " In my opinion the finding such as is, is not justified on the grounds on which it proceeds. That it is a self-acquired property of Gobind Singh is not relevant. That he must have borrowed money to make certain constructions which he did make is nothing better than surmise. To justify such a conclusion there should be legal evidence. The defendant

no. 4 Mohan, a remoter collateral than plaintiffs, attested the mortgage-deed has no value. If examined as a witness, he might have given useful information but this was apparently not done. It is only if the presumptive heirs who alone are expected to take exception to the alienation in question consent by attesting the deed, inference of legal necessity is justified. A remoter reversioner cannot by his action bind the presumptive heirs. *See* Rangasami Gounden *versus* Nachiappa Gounden (1).

A rukka alleged to have been executed by Govind Singh was produced but the Assistant Collector does not treat it as duly proved. He relies on it because it is recited in the mortgage-deed. A recital in a deed of recent date executed by a Hindu widow is no evidence of the fact recited. The learned Assistant Collector throws doubt on the defendant's case by observing that "the total amount of mortgage-deed may have been exaggerated but it looks probable that Musammat Uchabia did take a loan." The two courts of appeal did not enter into this question. I may note that I construe the concluding paragraph of the letter of the Government making the reference as calling the opinion of this court on all the questions arising in the case and mentioned in the petition to which it (the letter) refers.

In answering the reference I summarize my opinion as below :

The share of pakka khaikar tenure and its appurtenances in dispute in the case belonged to Govind Singh deceased husband of defendant no. 1 in full heritable right and the plaintiffs as his reversionary heirs are not debarred from succeeding to that share by reason of their not being joint in cultivation with him or defendant no. 1.

(2) The finding of the Assistant Collector that the mortgage relied on by defendants nos. 2 and 3 was justified by legal necessity is not correct.

*Sen, J.*—I entirely agree.

*By the court*—Let a copy of our judgment be sent to the Local Government in answer to its reference under rule 17 of the rules and orders relating to Kumaun Division made by its letter, dated March 26, 1928.

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IN THE COURT OF N. C. STIFFE., ESQ., C.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated January* 31, 1929

SPECIAL REVENUE APPEAL NO. 20 OF 1928-29

Salig Ram of village Naugaon, patti Mawalsyun, district Garhwal ... ... ... ... *Appellant-Plaintiff,*

*versus*

Jotu and others of the same place ... ... *Respondent-Defendant.*

Appeal against order and decree of Lala Prem Lal Sah, Additional Deputy Commissioner, Garhwal, dated October 5, 1928, claim for ejectment from 79-4 nalis land in village Naugaon, Mawalsyun.

*Held* by Mr. Stiffe, Commissioner, Kumaun Division, that mere settlement entry of a few nalis khudkasht at Beckett's settlement, and the village not being included in Pauw's list of pakka khaikari villages without actual possession of the hissedar, does not change the status of a pakka khaikari village, though the tenant is recorded as sirtan of that land in settlement.

ORDER

Salig Ram, plaintiff-appellant, claims to eject Jotu and others from 79 nalis of land in village Naugaon. The land in suit is 79-4-16 nalis. The only entries at Mr. Beckett's settlement that seem to cover this land are two khatas, one of 8-8-16 and one of 19-14-16, both recorded as khud, but there is a confusion here in that the 8-8-16 are also included in Gopi Sunara's khaikari khata. Presumably the rest of land consists of extension.

Owing to the existence of this 28/6/16 khud land the village was not included in Mr. Pauw's list of villages in which the hissedars had no khud at Mr. Beckett's settlement but all the circumstances of the case as recorded in the judgments of the lower courts make me agree with them that the khud entries are farzi; and that had Mr. Beckett made any difference between pakka and kachcha khaikari villages he would have held this to a pakka khaikari village. I note that by Mr. Pauw's settlement the khud of the zamindar had dwindled to about 3 nalis, and this uncultivated, I have no doubt that the village is a pakka khaikari one, this being so, the hissedar had no power to deal with the waste land, and to create sirtans in the benap. When Nayabad is granted to a khaikar, its status is khaikari; and I take it that the same principle applies to extensions. This 8/8/16 nalis was most certainly khaikari at Beckett's settlement though also recorded as khud, and this leads me to mistrust the classification of the 19-14-16 as khud. We have it on record that at that time the village was inhabited by three khaikars only. I have no doubt that they held all their land on that tenure. The subsequent accretions that have resulted in 79-4-16 nalis must be held also to be a khaikari land. I therefore agree with the lower courts and dismiss the appeal with costs.

N. C. STIFFE,

*November* 3, 1929. *Commissioner, Kumaun Division.*

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PETITION NO. 13 OF 1929-30

*Copy of Board's order passed in the case of* DHARMA NAND, *applicant*, versus DEBI DATT, *respondent, mauza Santuri, patti Rithagarh, district Almora.*

Application for revision of the order of the Commissioner of Kumaun, dated November 8, 1929, in the case of declaration of right and recovery of possession.

*Held* by Mr. Smith, Junior Member, Board of Revenue, that transfer of khaikar holding in a pakka khaikari village is not void *ab initio*; such transaction is not definitily forbidden and it is neither immoral in itself nor contrary to the public interest. The only person entitled to challenge a transaction of this nature is the khaikari body as a whole.

In 1922 the mother of the minor plaintiff transferred his khaikari holding to the present applicant by sale-deed. The village is a pakka khaikari village and the applicant was already a member of the khaikari body. The plaintiff came forward in 1928 under the assumed guardianship of his uncle to sue for cancellation of the sale-deed for declaration of his right in the transferred land and for possession thereof.

The suit falls under serial no. 9 of group (A) of the first schedule and the period of limitation is one year from the date of the transfer. The suit was therefore *prima facie* time barred. It is true that the suit was filed under serial nos. 15 and 21 also but it comes primarily under serial no. 9 for without cancellation of the transfer the suit could not succeed.

On behalf of the plaintiff it is contended that section 6 of the Limitation Act justifies the suit.

This section was made applicable to the Kumaun Rules by a notification issued in 1918. It gives a minor the right to challenge a transaction after attaining majority by a suit which would ordinarily have been time barred and numerous rulings have been quoted to the effect that under this section suits may be brought on behalf of the minor during his period of disability even after the ordinary limitation has run. References may be found on page 69 of the 4th Edition of Mr. K. J. Rustamjee's Commentary on the Law of Limitation. This being so, it must be held that the suit lay and that it was not barred by limitation.

The judgment of the first court is marred by a failure to understand the real position of the parties and the Assistant Collector allowed himself to be led astray by a consideration of the part said to have been taken by one of the hissedars in the transaction.

The claim was decreed by the first court but was dismissed by the Deputy Commissioner on appeal. It went to the Commissioner in second appeal and the suit was again decreed on the ground that khaikari right is heritable but not transferable and that no sale of such right can possibly be allowed. The suit was pressed on two main grounds, the first of which was that khaikari right is non-transferable and that the transaction was void *ab initio*. The second was that it had not been entered into for the benefit of the minor. Practically no evidence was given on the second point but the facts are sufficiently clear from the document itself. The area transferred was ten nalis odd, equivalent to approximately half an acre. The consideration was *prima facie* ample and it is mentioned in the sale-deed that the plaintiff's father had left debts and that his mother had herself run into debt, in order to maintain herself and her son. It is true that mere recital in a deed is not ordinarily sufficient to prove legal necessity but in the case of a trifling transaction of this kind it would

be unreasonable to call upon their transferee to produce evidence to prove the accuracy of the statement made by the plaintiff's mother in the deed of sale regarding the indebtedness which led her to dispose of the small area in suit.

Sir Henry Ramsay, describing the position of the pakka khaikars said " They are in all respects equal to proprietors with the exception that they cannot sell their holdings and they pay a small sum in addition to the quota of revenue due from the land recorded in their names. " Later on as related on page 92 of Mr. Stowell's Manual Colonel Fisher held that khaikars in a wholly khaikari village cannot transfer their holding by sale or gift. Mr. Stowell went on to give reasons for doubting the correctness of this view and it is believed that the question has never come before the Board for final decision.

For the purposes of the present case the proposition may be accepted that khaikars have no right of transfer but it is to be considered whether a transfer made under the circumstances of the present case is absolutely void or merely voidable. Such transaction is not definitely forbidden by any law and it is neither immoral nor contrary to the public interest. This being the case it must be held that the transaction was not void *ab initio* but that it can be challenged by any person having right to do so.

The hissedar has no rights in a pakka khaikari village beyond receiving the revenue and malikana levied at settlement and when khaikari holdings falls in owing to the death of a khaikar without leaving any heir the persons who benefit thereby are the surviving members of the khaikari body and not the hissedars.

From this it follows that the only person entitled to challenge a transfer of this nature is the khaikari body as a whole. The minor plaintiff is also entitled to challenge it if he can show that it was made contrary to his interests. This as already shown is in no way established.

I would therefore hold that the suit was not barred by limitation but that no adequate ground has been shown for cancelling the transfer on the merits. I would set aside the order of the Commissioner and restore that of the Deputy Commissioner with costs to the applicant in both courts and pleader's fee of Rs.15.

J. C. SMITH,
*Junior Member.*

*June* 27, 1930.

I AGREE.

R. OAKDEN,
*Senior Member.*

*July* 9, 1930.

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

SPECIAL REVENUE APPEAL NO. 19 OF 1932-33.

Thobi and others of Mathgaon Kandarsyun, Dewalgarh, Garhwal, *versus* Dharma Nand and others, Pokhari, Chalansyun, Garhwal.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that a suit for declaration that a village is a pakka khaikari lies in a civil court, the land entered as khudkasht of the hissedar at Pauw's settlement is the hissedars khudkasht and the status of the tenant cultivating it is that of a sirtan.

ORDER

Thobi and others panch khaikars of village Mathgaon in Gharhwal filed a suit against the hissedars of the village in the court of the Sub-Divisional Officer, Barahsyun, for declaration that the village was a pakka khaikari one and for determination of their class of tenure in respect of some 82 nalis of land recorded as the khudkasht of the hissedars

The court of first instance dismissed the suit firstly because it held that it was time barred and secondly because there was insufficient evidence to rebut entries of old standing.

In appeal the Deputy Commissioner held that the village was not a pakka khaikari one and that with regard to the area entered as khudkasht the suit lay in the civil and not in the revenue court. He therefore dismissed the appeal.

Since the order now appealed against was passed the Board of Revenue has held definitely that a suit for declaration of the status of a village does not lie in a revenue court but in a civil court. The decision of the lower court upholding the dismissal of the suit in respect of this relief was therefore correct although it arrived at this decision by another way.

There now remains the question of the nature of the tenancy of the land in suit.

The lower appellate court has held that this question cannot possibly come under serial 21, because the land in suit is not tenancy but khudkasht. This is actually the point at issue for the appellants claim that the land is not khudkasht at all but is in their cultivating possession as khaikars. The decision was therefore *a priori* and based on no foundation. There can be no doubt that the panch khaikars are entitled to bring a suit under serial 21 (6) Kumaun Rules to determine their status in respect of a tenancy holding held by them as a body just as much as any individual can bring a suit in respect of his own holding. I distinguish however between such a right and any claim put forward by the panch khaikars to sue in a respect of land that is not strictly joint. Thus in the land the status of which is in dispute consists of several holdings it is not the panch khaikars but the individual khaikars only who can sue under serial 21. In respect of land of the nature of gaon sanjait however the panch khaikars could sue as such.

There is nothing in the file before me to show whether this is a common holding or not; moreover the arguments have been confined to the general question. But the land is that which in 1915 was included by Mr. Nelson, with the exception of two fields in the forest. At that time

Mr. Nelson who was Forest Settlement Officer, paid compensation to the hissedars and not to the khaikaris and made a point of leaving outside the two fields so that there might still remain some hissedari land in the village. The appellants made no objection then though it is quite certain that if the land had been in their possession they would have done so. Again at Mr. Pauw's settlement this area was entered as khudkasht, and the lower appellate court's order shows that Thobi appellant was present during the settlement and made no objection. The entries made in the course of a settlement are of peculiar value owing to the care taken to ensure correctness and very strong proof is necessary to show that they are wrong. In this case I do not find such proof. Reference has been made to previous settlement entries but the last settlement supersedes completely any previous settlement.

I am of opinion that there is no doubt that this land is khudkasht and that the status of the appellants in respect of it is that of sirtans. The appeal is therefore dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF W. F. G. BROWNE, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL.

*Dated February 7, 1933.*

REVENUE APPEAL NO. 7 OF 1932-33.

*Instituted on October 17, 1933*

Gyanu and Goria 69 others, Tilbara, Talla Nagpur, Garhwal ... ... ... ... *Appellants,*

*versus*

Ranjeet Singh and others of Kothgi, Dasjula, Garhwal *Respondents.*

Appeal against the order of P. Lakshmi Datt Joshi, Assistant Collector, 1st class Chamoli, Garhwal, dated September 19, 1932.

Suit for declaration of khaikari rights over 202-15-16 nalis in village Tilbara for getting the village declared as pakka khaikari village.

*Held* by Mr. Browne, Deputy Commissioner, Garhwal, that a claim for declaration of khaikari rights by the panch khaikars of a pakka khaikari village in respect of a holding which was entered as khudkasht at Pauw's settlement falls under serial no. 16 of the Tenancy Rules and is barred by three years' limitation. Held further that a suit for declaration that the village is a pakka khaikari one by the panch khaikars in a pacca khaikari village falls under serial no. 21, sub-sections (*b*) and (*c*) of the Tenancy Rules for which there is no period of limitation prescribed.

ORDER

Gyanu and others, khaikars of village Tilbara, appeal against the order of Pandit Laxmi Datt Joshi, Assistant Collector, 1st class, dated

September 19, 1932, dismissing their suit against Ranjeet Singh and others (hissedars, respondents) for (1) declaration of appellants' khaikari rights over 97 nalis land and for (2) declaring the village to be a "pakka khaikari" one.

The lower court found the suit to be time barred and this certainly is in so far as it is a suit under serial no. 16 group A of the Kumaun Rules, which gives the limitation as 3 years from the date of overtact of infringement of rights. In respect of the area in suit the plaint states that at Mr. Pauw's settlement the respondents party by "chalaki" got the land in suit entered as their khudkasht as sirtani. This allegation amounts to one of an overt act of infringement of appellant's rights as it mentions that the entry was the result of respondent's act of "chalaki" but the plaint goes on to say that it was not till April, 1931, that appellants learned of the infringement and the respondents took possession of the land in distpute. Appellants have produced no evidence whatsoever to the effect that such possession was taken in 1931 and indeed I consider that allegation to be entirely false and made in order to create a "farzi" cause of action. In so far as the suit comes under serial no. 16 it certainly was time-barred.

The other plea prays for declaration that the village is a pakka khaikari one. I consider that this may welcome under sub-sections (*b*) and (*c*) of serial no. 21 in group A, for which there is no limitation at all. The lower court came to no finding on this issue, but it seems to me equitable that I should do so. The village was entered by Mr. Pauw in his list of pakka khaikari villages and Mr. Beckett's muntakhib shows that at the latter's settlement there was no khudkasht in the village. It is true that in 1884 Ranjeet Singh's father got 60 odd nalis entered as his khudkasht by way of a revenue suit but it is a well-established principle that such obtaining of khudkasht by a hissedar cannot alter the status of a village to that of a kachcha khaikari one. I must therefore hold that Tilbara is still a pakka khaikari village.

The appeal is allowed in that I declare Tilbara to be a pakka khaikari village; it is dismissed in that I find that the suit was time barred as regards declaration of appellant's khaikari rights over the area in suit.

Parties will pay proportionate costs.

W. F. G. BROWNE,
*Deputy Commissioner, Garhwal.*

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PETITION NO. 22 OF 1932–33

*Copy of Board's order passed in the case of* THAKUR PREM SINGH, *etc., applicants,* versus TRILOK SINGH, *etc., respondents, mauza Malli Mahroli, Talla Chaukot, pargana Pali, district Almora.*

Application for revision of the order of the Commissioner, Kumaun Division, dated March 28, 1933, in the case of declaration.

*Held* by the Board of Revenue, United Provinces, that a revenue court had no jurisdiction under serial 16 to grant a declaratory decree to the effect that a village is " Pakka Khaikari " village. Held further that the court was competent under the wide wording of serial 16 to give any sort of decree which was capable of execution, such as for ejectment, cancellation of a document relating to the disposal of a holding, with or without ejectment and so forth.

ORDER

This is an application in revision under section 17 of the Kumaun Rent and Tenancy Rules, 1918. It raises some points of importance and I have heard counsel at great length.

The original suit was brought by Tritok Singh and 63 others describing themselves as khaikars of village Malli Mahroli against Bahadur Singh and 12 others described as hissedars of Jaspur.

The suit as originally brought, purported to be brought under Group A, Schedule I of the rules, serial 21(*b*) and ran as follows: " ..waste karar diya jane kojo asami wa mudaiyan nethi suda kaghizat mai men darj mudaiaham ke khud kasht arazi ko pane ke haqdar hain."

Which, so far as I can interpret, it means " that the tenants and plaintiffs whose names are mentioned in the plaint are entitled to the land recorded as khudkasht in the revenue papers in the names of the defendants." The plaint was subsequently amended and then ran " .....waste karar diya jane ke mudaiyan kashtakaran Malli Mahroli ke pakke khaikar hain dawa wali zamin 130 mauza Malli Mahroli Talla Cholot phant khatas nos. 1/13, 1/15, 1/25, 8/3 wa muntakhib khata nos. I November 20, 1921 wa 4—9/16th nalis of Nayabad khata no. I."

The plaint stated that the plaintiffs were khaikars and residents of Malli Mahroli; that the village was a pakka khaikari village as was clear from Beckett's " hukumnama " in which the hissedars had no khudkasht; that when the Assistant Settlement Officer came to Tamadaun (presumably nearby) all the asamis were called and the papers were looked through, that then the plaintiffs discovered that 130 nalis of land had been recorded in the khudkasht of the hissedars by fraud; that all the lands of the village had been from the time of their ancestors in the possession of the plaintiffs and that the hissedars had never had possession in it of any sort; that as a result of the hissedars getting this land recorded in their khudkasht the village becomes kacha instead of pakka,; that thereby much loss would be caused to the plaintiffs; that the " milkiyat "of all land which has been abandoned and of which the holders died heirless belonged to the " panch khaikaran " and that the hissedars could not interfere with their rights or become " heirs " of the possession of any land and that the cause of action arose in the month of March, 1929, when the Assistant Settlement Officer came and the records were inspected.

The relief claimed was that the village be declared to be a " pakka khaikari " one and that the defendants have no right to have the lands in suit recorded as their khudkasht.

The defendants denied all the allegations of the plaintiffs. In addition they pleaded as follows:

That at Mr. Beckett's settlement in 1888 (*sic*) and even after that, two khaikars namely Udia and Kaliya who had died issueless and their khaikari land had come into the khudkasht of the hissedars and had been held by sirtans of the hissedars; that after this at the settlement of Mr. Goudge some land had been entered in the khudkasht of the hissedar, and that on objection being taken by the hissedars some newly measured land which had been entered as "sanjait khaikars" was entered in the khudkasht of the hissedars and that the khaikars had informationof this and that for the plaintiffs to say that they got information of this in the month of March, 1929, was entirely wrong; "that the plaint was time barred; that the village of Mahroli was not a pakka khaikari" village; that there was khudkasht in it and the statement to the contrary was untrue; that a suit for declaration alone could not be prosecuted, and that their suit did not fall within serial no. 21 of the rules that the court-fees paid were insufficient and the suit ought to be dismissed.

The last plea seems to have been responsible for the amendment of the plaint and the filing of fresh court-fees.

It will thus be seen that the pleadings were vague and unsatisfactory, to say the least. The court framed the following issues:

1. Are the plaintiffs in possession of 130 nalis of land included in such and such khatas?

2. Is the suit time barred?

3. Is Malli Mahroli a "pakka khaikari" village?

4. Are plaintiffs entitled to have entries in respect of 130 nalis as khudkasht of the hissedars cancelled?

The 130 nalis in suit are divided over certain holdings, to wit, those of Udia (2 holdings), Kalia, Dikar and Sobhania, Musammat Lareti, and Faqira. It decreed the plaintiff's suit as regards the holdings of Bikari and Sobhania and Musammat Lareti but dismissed it as regards those of Udia, Kalia and Faqira and declared the village to be a "pakka khaikari" village. The suit was held not to be time barred as regards the area actually in the possession of the plaintiffs; and the plaintiffs were declared to be entitled to have the entries corrected in respect of the holdings which were found to be in their possession; but no order was passed for correction of the records.

The Deputy Commissioner in appeal upheld the findings as regards pakka khaikari status and the findings as regards the various entries. As regards the question of limitation he wrote: "As I have held in other khaikari cases, I hold that the main issue regarding the status of the village comes under serial 21 of the group A of the schedule to the Kumaun Rules and is not barred by limitation. As regards the rest of the suit if the claim were to obtain possession of land wrongly reverted

to the hissedars, this would be subject to three years' limitaion under serial 16. But as it is, the relief sought is only correction of papers, and where this has been allowed by the lower court possession has been held to be established, so the question of limitation does not arise." I find it very difficult to appreciate the precise meaning of these remarks.

The learned Commissioner held that "as this case is definitely with reference to rights and status section 21 applies and there is no bar. The rest of his judgment deals with the status of the village, whether pakka khaikari or not. He dismissed the second appeal.

Before we proceed further, I would remark that the suit has been brought by 63 persons who apparently comprise all the khaikars of the village. Whereas a suit if brought at all should be brought by the panch khaikars. It does not, however, seem to make much difference whether a suit is brought by all the khaikars or by their panch and in the absence of any objection on this score, I take the suit to be brought by or on behalf of the "panch khaikars."

Now it may be conceded that with a piece of legislation so crude as the Kumaun Rules, a variety of interpretations can be put on the various wordings found in it. It may be also conceded that the litigation that comes before the courts is so much on the border line between strictly civil and strictly revenue litigation that courts who deal with both find it difficult to distinguish between the jurisdiction vested in them as civil courts and that vested in them as revenue courts. But the findings of the lower courts involve propositions to which I find myself, on prolonged and careful consideration, wholly unable to subscribe.

In the first place, no section or serial of the Rules seems to me to cover a suit for declaration of any sort. Such declaratory decrees are usually foreign to revenue courts. They are incapable of execution, and in the only cases in which provision is made for them in the Agra Tenancy Act, III of 1926 (sections 121 to 123), they have given rise to immense trouble and uncertainty. I note in this case that even the first court did not give a decree that the names of the hissedars should be expunged from the records. Even in serial no. 21, the word "declaration" seems to be avoided in favour of "determination" though the serial is evidently based on section 95 of Act II of 1901. In the second place, the jurisdiction of the revenue courts is evidently restricted by the rules to certain specific suits. There is no provision for alternative relief. There was no such provision in Act II of 1901 on which the rules and their schedule are obviously based, and in the Agra Tenancy Act of 1926, such relief is confined to cases under sections 186, 187, 188 and 44 (*vide* section 192 of the Act). It would not be legitimate to give a relief under serial 21, when a suit is brought under serial 16, even if it were possible. In the third place, no suit seems to me to lie under serial 21 all in all. Though the wording is vague a reference to section 95, Act II of 1901, which it closely follows, shows that suits are intended for the landholders

on the one hand against the tenant on the other and *vice versa*. No provision under that section is made for a suit by a tenant against a tenant (unless possibly the tenant sued is a sub-tenant). Khaikars are tenants. It might be urged that the "panch khaikars" are in the nature of landholders. But they are not the landholders of the actual occupant of the lands in suit in this case; if they were, there would be no need for them to bring a suit. The occupying tenant when he is a khaikar might bring a suit against the hissedars, but that would be to acknowledge him as the landholder which is in fact what the plaintiffs wish to deny. Lastly, the law can scarcely have intended to impose a period of limitation with one hand and to take it away with the other, by allowing a suit under serial 16 to be joined with one under serial 21 or to give an option to the plaintiff to bring his suit under either section. Fourthly, in my opinion no person is entitled to sue for a relief to the effect that certain entries shall be expunged from the prescribed registers or these, "corrected under section 33 of the Land Revenue Act" entries in these registers can only be made under the orders of the Collector and then only on the basis of possession; and the Land Revenue Act contemplates certain proceedings before an entry is made. A decreeholder could only approach the appropriate court after he had obtained a decree for formal possession at or an acknowledgment of possession; only then would such court order a change in these records. Nor can consequential orders involving changes in the "phant" which correspond to the khewat of the plains districts be passed by revenue courts though they can be in respect of entries in other registers, *vide* K. C. M., page 99, rule 21.

The appropriate serial therefore is serial 16. But if a declaratory decree is ruled out the question arises what sort of decree did the serial intend?

Now the wording of the serial says, "a suit by or on behalf of the panch khaikars of a pakka khaikari village against a landholder on the ground of infringement of their common rights." The relief that may be sought is not stated but as the decree is clearly meant to be capable of execution, the wording must mean that the khaikars can claim any relief they like which will satisfy their object. At any rate the wording is wide enough to cover such an interpretation. Such relief must be: (1) in the case of a landholder who takes possession of any alleged khaikari land on the death of a khaikar without heir or heirs which he is not entitled to inherit, and cultivates the land himself, a suit lies for his ejectment as a trespasser; (2) in the case of a tenant put in by the landholder in similar circumstances, for cancellation of the arrangement or ejectment of the person put in or both; (3) where a landholder purports to execute a document which confers a certain status on some person purporting to be put in by himself, for cancellation of such document or ejectment of such person or both. If the suit is viewed in this light, the position becomes clear. The khaikars start with the allegation that the village is a pakka khaikari one. They allege six specific instances in which the landholder has infringed their common rights by putting in or letting the land of which the holder has died without heir entitled to inherit or which has

been nominally abandoned. In each case the landholder has executed a lease in favour of the occupier, but here too the occupier is a relation of the outgoing khaikar. The plaintiffs do not wish to eject these persons. Their suit if it means anything is for formal delivery of possessions to themselves of the land of which the landholder has taken possession by nominally planting the occupiers thereon as his tenants and in the case of the occupier in whose favour a lease has been executed, a cancellation of the lease and formal delivery of possession to themselves.

The following issues at once arise :

1. Is the village of Malli Mahroli a pakka khaikari village? (Burden on the plaintiff).

2. Is the suit time barred in respect of all or any of the holdings the overt act of infringement being clearly the putting in of the occupier by the land-holder as his tenant? (Burden on the defendant.)

If the plaintiffs succeed in proving the first issue there will be no need for a declaration, the finding will operate as *res judicata* between the same parties. If they fail, no suit can lie under serial 16 because the village to which such a suit relates must be a pakka khaikari village.

I will deal with the second issue first as it raises a point of law.

The holdings in suit "reverted" to or were mutated in the names of the hissedars as follows:

1. Udia's holding of 20/10/16 nalis—in 1888.
2. Udias' holding of 18 nalis—in 1901.
3. Kalia's holding 1890.
4. Dikari and Sobhania's holding—on 23rd May, 1914.
5. Musammat Lareti's holding on May 27, 1927, wrongly given in the first courts order as May 23, 1914.
6. Faqira's holding—on 14th May, 1929.

Now I do not propose to enter into the question of fact in revision and accept the findings of the lower courts as regards possession of the various holdings. In respect of lands however which have been found to be still in the possession of khaikars as such the suit is obviously otiose and no question arises. As regards the lands which have been found to be in the possession of the defendants or of tenants professedly admitted by them, the court says: "In respect of which the area which is in the possession of the defendants the suit is time barred." The issue (no. 2) was therefore found partly in favour of the plaintiffs and partly in that of the defendants. The finding discloses great confusion of thought but the net result of it must obviously be that the suit is not time barred. I have shown above at what dates reversion or mutation took place ; and it is obvious the suit would be time barred in respect of all holdings except that of Faqira unless good cause were shown to the contrary. This might be on the ground that the khaikars had no knowledge of the proceedings in "reversion" or "mutation." But such a plea, as the defendants pointed

out, was ridiculous in respect of Udia, Kaila, Dikari and Sobhania's holdings of which reversion or mutation took place in or before 1914; while in respect of Musammat Lareti's holding they were able to produce copies of the mutation orders and the actual proclamation issued records of the rest have been weeded out. But there is no reason to suppose that the ordinary procedure was not adopted with regard to them, and mutation of one of them (Udai's holding of 18 nalis') seems to have taken place at Mr. Goudge's settlement during some sort of proceedings in attestation. Little doubt is left in my mind that the khaikars had knowledge of what was taking place on each of these occasions they merely failed to challenge the action of the hissedars. A similar finding was recorded in a similar case in respect of the village of Dhaniyalin, a judgment copy of which is on the file. There remains Faqira's holding which was mutated on March 14, 1929. This suit was brought on May 3, 1929 or very shortly afterwards. In respect of that holding it is obviously within time. I strongly suspect that the khaikars knew very well that the suit lay in respect of that holding only and that the other holdings were only thrown in to strengthen their case. The net result is that the suit was definitely time barred in respect of all but Faqira's holding.

I now come to the second issue.

In the district of Garhwal, I understand that there is an authentic list of "khaikari and kacha khaikari villages" prepared at settlement, but that there is no such list in Almora. The criterion of a pakka khaikari village as given me by learned counsel for the plaintiffs are :

1. That the village must have been entirely in the possession of khaikars "originally." "By originally" is meant according to him at the settlement of 1872.

2. That the village is included in the list of pakka khaikari villages.

3. That the hissedars cannot add to the khaikari body.

4. That no Nayabad grant can be made to a hissedar.

5. That when a khaikar dies issueless, his holding reverts to the khaikars and is at their disposal.

6. That leases are not given by, or relinquishments made in favour of the hissedars.

It has, however, apparently been judicially held that a "pakka khaikari" village can become a "kacha khaikari" one. At the same time it has also been judicially held in numerous cases before the highest tribunal in Kumaun that this can only happen as the result of "invasion" of the rights of the khaikars and that these "invasions" must be "extensive" and "sustained." This position must be accepted though I would remark that cases of khaikars dying issueless or without heirs entitled to inherit or abandoning their holdings cannot ordinarily be frequent, and therefore the opportunities for "invasions" by the hissedars cannot be many and the test seems to be an inadequate one. Judged by these tests what is the position here ?

1. It is not denied that at Backett's settlement (1864—72) the whole villagewas held by khaikars.

2. Evidence has been given to show that the name of this village is entered as a pakka khaikari one in a list of khaikari villages prepared in 1883. The validity of this list has been impugned on the ground that it is not one prepared under the authority of an officer empowered to prepare such list. The fact remains, however, that the name of the village appears in such a list, that the list was prepared by a revenue officer apparently in the course of his official duties and that the list was produced in court from proper custody. This is a relevant fact.

3. The defendant hissedars have not added to the khaikari ody as far as the evidence goes at least in the past. They produced a registered deed of relinquishment executed in their favour by one Musammat Saduli and another of conferment of khaikari rights on one Dhan Singh executed by themselves. But both these documents are dated April 12, 1929, just before the institution of the present suit, and their value therefore has to be heavily discounted. These documents seem to represent recent attempts on the part of the hissedars to strengthen their position.

4. A copy of an order of court has been produced by the defendants (Ex. L on the file) to show that a Nayabad grant was made in their favour. It is an order sanctioning extension of cultivation of 100 nalis in favour of one Mangal Singh, one of the hissedars (now dead) of the village dated so far as I can make out, August 25, 1905. It is very vaguely worded and the circumstances in which it was passed have not been adequately explained. Obviously such an order might be passed without the khaikars knowing anything about it, and it is not known whether it was ever acted on.

6. The only relinquishment proved is that made by Musammat Saduli which has been dealt with under (3) above. There remains no. 5. In all six cases quoted by the plaintiffs, their contention is that the persons in possession are in fact heirs in some form of the deceased or abandoning khaikars who originally held. In two cases, viz. those of Dikaria and Sobhania and Musammat Lareti, the finding of the courts is in favour of the plaintiffs; in the remaining three it is in favour of the defendants. I should like to point out at this stage that the actual findings with exception are negative or unsatisfactory. In the case of both Udia's holdings the finding is that they are in the possession of the sirtans of the defendants without saying who the occupiers are. The same finding is given in respect of Kaliya's holding. In the case of Musammat Lareti's holding the finding is "the defendants have failed to prove that Dikari and Sobhania are their sirtans." This is a mistake for Dewani and Narpati who were admittedly in possession and related to Lareti. In respect of Faqira's holding there is no finding at all as regards the occupier, it is found to be "in the possession of the defendants" but it is certainly not being cultivated by any of the defendants. Only in the case of Dikari and Sobhania's holding is there a positive finding. The land in these holdings is sometimes spoken as having been "reverted" to the hissedars

and sometimes as having been mutated in their names, as if these were the same thing. The use of these words as interchangable is only likely to lead to confusion if their use does not cause actual confusion of mind. However the net result of the findings of the lower courts by which I am bound in revision is that only in three cases have the defendants proved a successful "invasion of the khankari rights." These invasions were separated by long intervals and covered some 64 nalis out of a total of over 1,900 nalis. They cannot therefore be said to be either "extensive or sustained." They are not sufficient in themselves, therefore, to reduce the status of the village from a pakka to a kacha khaikari one. In addition to the above, however, the defendants (1) have produced evidence to show that the name of the ghar padhan of the khaikars was removed from the phant of khaikars and replaced by the name of one of the hissedars as far back as 1873 under an order of Sir Henry Ramsay; and (2) urged that the khaikars have not proved that any one of themselves was ever a padhan. But the precise effect of this order is obscure as is also the intention of the court which ordered the change. I am unable therefore to hold that these pleas, even though apparently true, materially strengthen the defendant's case. I accordingly agree with the conclusions of the lower court, viz. that the village and its status has not been reduced to that of a kacha khaikari one. A suit by the plaintiff therefore lay.

My findings therefore are:

*Firstly*—That the suit was correctly brought under serial no. 16 of the schedule to the Kumaun Tenancy Rules of 1918; and that serial no. 21 does not apply to such cases.

*Secondly*—That a revenue court had no jurisdiction under serial no. 16 to granta declaratory decree to the effect that a village is a "pakka khaikari" village.

*Thirdly*—That the court was competent under the wide wording of serial no. 16 to give any sort of decree which was capable of execution such as for ejectment, cancellation of documents relating to the disposal of a holding, with or without ejectment and so forth; but that it was incumbent on plaintiffs under that serial to state the relief to which they thought they are entitled; and incidentally to stamp it with the proper court fees accordingly.

*Fourthly*—That the suit was definitely timebarred in respect of all the lands in suit except that of Faqira's holding.

*Fifthly*—That the village of Malli Mahroli was originally a "pakka khaikari" village and that its status has not been altered by the "invasion" of the hissedars as disclosed in evidence as the proved "invasions" do not satisfy the test of "extensive" and sustained "invasions" which have been judicially held to be necessary to change the status of such a village.

In the result, the decree of the lower court's declaration declaring the village to be a pakka khaikari one, and allowing the suit in respect of Dikari and Sobhania and Mst. Lareti's holdings will have to be set aside,

the latter on the ground of limitation. The decree in so far as it dismissed the suit in respect of Udai and Kaliya's holdings will be upheld both on the ground of possession and on the ground of limitation ; while in respect of Faqira's holding it will be upheld on the ground of possession.

Lastly, no consequential orders to make corrections in the prescribed registers being possible under the law, the finding of the court of first instance on its issue no. 4 to which as a matter of fact no effect was given in the final order passed will have to be set aside.

I would therefore allow the application in revision and set aside the order of the Commissioner, upholding the order and decree of the two lower courts, leaving the panch khaikhars in a position to challenge the next invasion, if any, of their common rights by the hissedars.

As the plaintiffs only win their suit in part and have been greatly to blame for not challenging the invasions of their common rights from time to time as they occurred within the period of limitation, I would let the parties bear their own costs.

D. L. DRAKE-BROCKMAN.

A. C. HOLMES.

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IN conclusion I would say that evidently the remarks made in Stowell's Manual, page 18 of following section 5 are still true and demand the attention of the courts in Kumaun. The suit has been very badly framed. It is the duty of the courts to examine the parties who are largely ignorant of their rights and duties and of the intricacies of the law carefully and make them disclose for what relief they are suing; to come to clear and precise findings and to take care to grant decrees which are of value to the successful parties, the object of all litigation being to settle finally, as far as this is possible, the matters at issue between the parties.

D. L. DRAKE-BROCKMAN,

*September* 16, 1935. *Senior Member.*

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I WOULD not go so far as to say that no section for serial of the Rule seems to cover a suit for declaration of any sort. A suit can be brought for determination of any incident of a tenancy, and there seems to me to be no substantial difference between determination and declaration in such a case. The present suit however was not under section 21 at all. I agree with my colleague's finding.

*September* 22, 1933.

## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 17, 1934

SPECIAL REVENUE APPEAL NO. 1 OF 1933-34

*Instituted on October* 12, 1933

Appeal against the order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, district Almora, dated 14th August, 1933.

Padma Pati, Khima Nand and others of village Khanolia, patti Talla Dora, district Almora ... .. ... *Appellants-Plaintiffs,*

*versus*

Ram Datt, Har Datt and others of the same place ... ... ... *Respondents-Defendants.*

Claim for declaration of a sale-deed null and void and recovery of possession of the land under sale under Kumaun Tenancy Rules.

*Held* by Mr. Owen, Commissioner, that if the old khaikars of pakka khaikari village buy out the hissadari rights from the non-resident hissedars, the land cannot be their khudkasht but continues to be their khaikari; nor can the status of the village be affected by it. Held further that three instances since 1899 in which khaikari holdings lapsed to the hissedar cannot be called sustained and extensive invasion by the hissedars so as to change the status of the village.

### ORDER

This is an appeal from an order of the Deputy Commissioner, Almora.

A brief history of this case is necessary in order to understand the points at issue. In March, 1932, Ram Datt, Har Datt and Tika Ram of Khanolia village in the Almora District executed a deed of sale of some land in favour of Baijnath, Kulomani and Kantmani of the same village; whereupon the present appellants filed a suit under serial no. 9 of Schedule I, Group A, Kumaun Tenancy Rules, for cancelling this transfer which they claimed was illegal and recovering possession of the land.

It should at this stage be explained that the appellants are recorded hissedars of Khanolia village while the respondents are khaikars of the same village. The question of the status of the village thus becomes important for only if it is kachcha khaikari village have the hissedars a right to resume the land. If the village is a pakka khaikari one any land that is abandoned for any reason by a khaikar reverts to the general body of khaikars. The status of the village has therefore got to be decided as a preliminary to deciding the main point at issue.

My attention has been drawn to the Board of Revenue's ruling in petition no. 22 of 1932-33 in which it has been held that the body corporate of khaikars cannot sue in the revenue court for a declaration that a village is a pakka khaikari village but must go to a civil court. That case has

nothing in common with the one now before me. Here the determination of the status of the village is only incidental and would not have been considered at all were it not essential that a decision should be arrived at in order that the real point at issue might be decided. The decision of the revenue courts with regard to the status of the village is therefore in the nature of a summary finding which does not prevent the aggrieved party from going to the civil court for a proper declaration of status. I would therefore rule that the suit was correctly brought under serial no. 9 and that the lower courts were right in enquiring in a summary manner into the status of the village.

Coming to the facts of the case the claim of the appellants is that the village is a kachcha khaikari one; that respondents are kachcha khaikars and that therefore they have no transferable rights, that where such a transfer takes place it is illegal and the hissedars are entitled to get the transfer cancelled and can moreover resume the land. Both the lower courts have held that the village is a pakka khaikari one and that therefore the appellants have no rights to the relief which they have claimed. The arguments have been on the same lines as in the lower courts and are to the effect (1) that the village never was a pakka khaikari village and (2) that as the hissedars have acquired a large khudkasht area it can no longer be a pakka khaikari village.

With regard to the first point it is quite clear from the papers that at the time of the first settlement in 1845 the entire land was cultivated by khaikars and the hissedars collected the malikana of the village in full from these khaikars. Moreover the village had a ghar padhan which is generally the mark of a pakka khaikari village. I agree therefore with the lower courts that the village was undoubtedly a pakka khaikari village in 1845.

Some time before 1883 some of the khaikars' ancestors of the present appellants bought up the hissadari rights in the village and in 1883 there was another partition of the village for the purpose of giving each party the right to his own malkana. Lands cultivated by the new hissadars were now recorded as khudkasht.

It is important at this stage to consider what the status of the new hissedars was. In this case it was not the hissedar who had successfully made an entry in the village but the khaikar who had absorbed the hissedar. In my opinion there is a world of difference between these two occurrences. A khaikar who has acquired the hissedar's rights is none the less a khaikar for that reason. His status is not that of a hissedar with khudkasht rights but of a khaikar with hissedari rights. In my opinion such a khaikar can never deprive his fellow khaikars of the rights. If it were once admitted that he could, no pakka khaikari village in Kumaun would be safe. This is also the view of Mr. Stowell (Manual, 1928 Ed., P. 103, penultimate paragraph of section 15). There is apparently no ruling on this subject and I therefore re-affirm the principle that a khaikar who acquires hissedari rights remains a khaikar and

that his hissedari rights cannot adversely affect the rights of other khaikars in the village nor can they operate to affect the status of the village.

It follows from the above that the increase in the recorded khudkasht of the hissedars cannot influence this court in deciding the status of the village for the so-called khudkasht is not hissedar's khudkasht but khaikari khudkasht. The only question that remains is whether there has been "a process of extensive and sustained invasion." Altogether there have been only three instances quoted in which a khaikari share lapsed to the hissedars since 1899 and these were very small. This cannot be called sustained and extensive invasion and the lower courts were right in rejecting them. I agree therefore with these courts that the village has not lost its status as a pakka khaikari village.

This lengthy but necessary introduction brings us to the point at issue, namely whether the hissedars are entitled under serial no. 9 to the cancellation of the transfer of the land in suit. The court of first instance has held that the sale was void *ab initio* and has cancelled it under serial no. 9 but has held that the hissedars have no right to resume the land. I have been shown a judgment by Sir John Campbell, dated May 27, 1907 (Special Civil Appeal no. 6 of 1907) in which he has confirmed the view of Sir Henry Ramsay that a khaikar cannot transfer his khaikari rights. This judgment does not draw any distinction between a kachcha and pakka khaikar but the late Commissioner of Kumaun (Stubbs) in a circular order, dated August 5, 1923, held that the khaikari rights in a pakka khaikari village are clearly not transferable. Although there is nothing to show on what this order is based and although Stowell has opined that there should be a distinction in this respect between kachcha and pakka khaikaris, I am not prepared at this stage to disagree from this view. It follows therefore that the sale was null and void and that the lower courts were right in dismissing the suit of the hissedars to recover possession of the land. If anybody was entitled to resume the land it was the main body of khaikars.

The appeal is dismissed with costs.

L. OWEN,
*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated March* 23, 1934

SPECIAL REVENUE APPEAL NO. 7 OF 1933-34

*Instituted on January* 10, 1934

Appeal against the decree/order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated November 7, 1933.

Udai and other panch khaikars of Basot,
Talla Kaklason, Almora ... ... *Appellants-Defendants,*

*versus*

Daulat Singh and others of the same place ... *Respondents-Plaintiffs.*

Redeclaration to the effect that the village Basot is a kachcha khaikari village under Kumaun Tenancy Rules

*Held* by Mr. Owen, Commissioner, that a suit by the hissedars that a village is a kachcha khaikari village lies under serial no. 21 of the Tenancy Rules and is cognizable by the revenue court. *Held* further that a village which was originally a pakka khaikari village in 1872 is reduced to the status of a kachcha khaikari by sustained, extensive and often unopposed invasions of the hissedar.

ORDER

This appeal arises out of an order passed in a suit under serial no. 21 for a declaration that village Basot in the Almora District was a kuchcha khaikari village. The plaintiff in that suit, Thakur Daulat Singh, was the sole hissedar of the village. The khaikars were defendants. Both the lower courts have recorded concurrent findings that the village is a kuchcha khaikari one.

The first point raised is that the order passed by the Board of Revenue in petition no. 22 of 1932-33 (Prem Singh *versus* Trilok Singh) governs this case and that a declaratory suit does not lie in a revenue court but in a civil court the order referred to was passed in a suit under serial no. 16 and not under serial no. 21 and the Board's finding was that under serial no. 16 the court had no powers to grant a declaratory decree, serial no. 21 is an entirely different matter.

The trouble is that the expression generally used by the courts in the case of these suits is wrong and misleading. They should not be called suits for declaration that such and such village is kachcha or pakka khaikari but should be properly described as suit for the determination of the class to which the tenants of such and such a village belong. The suit lies under serial no. 21(*b*) of schedule A-I of the Kumaun Tenancy Rules and is triable in the court of an Assistant Collector, 1st class under rule 9 of those Rules. This is in effect the meaning of the explanatory note given by the Junior Member in petition no. 22 referred to above. It should be borne in mind that no suit for correction of papers lies in Kumaun except under one or other of the serials in schedule A-I.

I therefore hold that this suit was triable in the revenue courts and now proceed to discuss the present appeal on its merits.

The known history of the village is necessary to the decision of all these suits. The oldest document on the record is a fard phant of the year 1846 which contains a column for the names of the malguzars and another for the names of the tenants. Three malguzars were noted, Lachi Ram, Hans Ram and Bairagi and they were also recorded as qabzadars. Lachi Ram and Bairagi signed as padhans. It is claimed by the appellants that these ancestors were predecessors in interest of the

present khaikars. Actually this document only confuses the issue for a malguzar or padhan is a representative of the proprietory body and it is not part of the appellant's case that they were even anything except khaikaris.

The next stage in the village history is Mr. Beckett's settlement of 1872. There is no doubt that this time the village was a pakka khaikari village with its own ghar-padhan. Mr. Beckett's note on the subject is on the file. In 1873 however there was a relinquishment by one Bhim Singh in favour of the hissedar. About this time and during the settlement the village was under direct management as the hissedar was heavily indebted.

By 1883 he had paid off his debts and sued for the dismissal of ghar-padhan. The S. A. C. of the time wrote a very confused judgment in which he noted that two khaikars had resigned their holdings in favour of the hissedar (which suggests a kachcha khaikari village) that the village was entirely in the hands of the khaikars and that the hissedars had nothing to do with it (which implies a pakka khaikari village) and ended with an order dismissing the ghar-padhan and replacing him by the hissedar which certainly reduced the village to a kachcha khaikari one. The matter went up on appeal but the ghar-padhan was finally dismissed in 1886.

By 1888, 254 nalis of land were entered as the khudkasht of the hissedar.

Thereafter there is not much on the record to show the progress of the village but the court of first instance has noted that on eight occasions between 1906 and 1928 the hissedar asserted rights which could only have been asserted in a kachcha khaikari village. On the other hand on no single occasion has it been shown that the panch khaikars successfully asserted any of their rights as pakka khaikars.

I therefore find that the village was pakka khaikari one in 1872 but that since then the sustained, extensive and often-supposed invasions of the hissedar have reduced it to the status of a kachcha khaikari village.

The appeal is therefere dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 18, 1934

SPECIAL REVENUE APPEAL NO. 5 OF 1933-34

*Instituted on November* 11, 1935

Assa, Fatu, Lakhnu and others, village Satera Lagga Sandar, Patti Talla Nagpur, district Garhwal ... *Appellants-Defendants,*

*versus*

Deb Singh and others of village Syupuri, Talla Nagpur, Garhwal ... ... ... ... *Respondents-Plaintiffs.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated September 11, 1935.

Claim for declaration of rights over 181/11/16 nalies of land under Kumaun Tenancy Rules.

*Held* by Mr. Owen, Commissioner, following the ruling of the Board of Revenue, that a suit by a hissedar for declaration against the punch khaikars that a certain area of land in a pakka khaikari village is khudkasht lies in a civil court and does not fall under serial no. 21 of Kumaun Tenancy Rules.

ORDER

This suit was originally brought by Deb Singh and other hissedars of village Syupuri in Garhwal praying for a declaration of hissedari khudkasht rights in 181/11/16 nalis of land in village Sandar Lagga Satera. The suit was dismissed by the court of first instance but this order was reversed by the Deputy Commissioner on appeal.

There is nothing to show under what serial the suit was originally brought.

Now the Board of Revenue have held that a suit for declaration does not lie in a revenue court and there is no doubt that this particular suit has not been properly run. If the hissedars wish to ascertain the status of a particular tenant or group of tenants they can bring a suit under serial no. 21(*b*) and (*e*) and this decision will naturally establish the description of the land. But a suit brought against the entire khaikari body or against the panch khaikars for a declaration that a village or any portion of a village is of a particular nature is a matter for a civil court.

I have therefore no alternative but to allow this appeal and to set aside the orders passed by both lower courts. The hissedars should bring a suit under serial no. 21(*b*) against the khaikars who are actually in possession of the land in suit. Parties will bear their own costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 21, 1934

SPECIAL REVENUE APPEAL NO. 15 OF 1932-33

*Instituted on March* 27, 1933

Gayanu, Gauria, Kundan and other Panch khaikars of village Tilbara, Patti Talla Nagpur, Garhwal ... *Appellants-Plaintiffs*

*versus*

Ranjit Singh and others, of village Kothgi, patti Dasjula, Nagpur, Garhwal ... ... ... *Respondents-Defendants.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated February 7, 1937.

Claim for declaration of khaikari rights and for getting the village declared as a pakka khaikari village.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that a revenue court has no power to pass a declaratory decree to the effect that a village is pakka khaikari one.

(NOTE—For Mr. Browne's judgments see page 129 *supra*).

ORDER

This is a cross-appeal connected with appeal no. 16. The appellants had sued for a declaration that an area of 97 nalis in village Tilbara, Garhwal, was pakka khaikari land. The appellants are the panch-khaikars of the village. The lower appellate court found that the suit was time-barred as the period of limitation for a suit under serial no. 16A of the Kumaun Rules is three years from the date of infringement of rights.

But this suit cannot be deemed to come under 16A because in the first place it is by no means certain that the village is a pakka khaikari one. Even if it is the suit is undoubtedly time barred under this serial as both lower courts have found. Furthermore, there can be no suit brought by the panch khaikari body for a declaration that a certain area of land is pakka khaikari. Any tenant and perhaps any body of tenants can bring a suit for determination of their status in respect of their own holdings but such a suit lies under serial no. 21 and is a matter for the khaikars or hissedars concerned and not for the panch-khaikari body as a whole.

For these reasons the cross-appeal is dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge, Kumaun Division.*

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PETITION NO. 24 OF 1933-34

*Copy of Board's Order passed in the case of* KRISHANA NAND, ETC. *applicants,* versus DAULAT SINGH, ETC. *respondents, district Almora*

Application for revision of the order of the Commissioner of Kumaun Division, dated the 23rd March, 1934, in a case of declaration to the effect that the village Basot is a kachcha khaikari village.

*Held* by Mr. Drake-Brockman, Junior Member, Board of Revenue, that while a declaratory suit regarding the status of khaikari villages, cannot be brought under the Kumaun Tenancy Rules, 1918, either by the khaikars of a pakka khaikari village or the hissedars of a village which

they think is not a pakka khaikari village, suits can be brought under serial nos. 16 and 21 in which the status of a village will inevitably be involved; and that such suits must be brought in the revenue courtse. *Held* further, that as the khaikars, as a body, can only challenge individual acts of infringement of their common rights, seeking consequential relief at the same time, under serial no. 16, or other appropriate serial, so the hissedar can only bring a suit under serial no. 21, against the individual khaikar to determine his class or status. As in suits under serial no. 16 an issue regarding the status of the village will arise on the pleading so in suits under serial no. 21 a similar issue will arise. It is true the decision will not be binding on the rest of the khaikars who are not parties to the suit; but the decision will form a precedent and ae sufficient number of precedents in favour of the hissedar may in time make up that body of continuous, extensive and sustained invasion which under the case law of Kumaun may destroy the status of a pakk khaikari village.

The plaintiff-respondent, Daulat Singh, who is sole hissedar, filed a suit for a declaration that the village of Basot, patti Talla Kakalson, is a kachcha khaikari village. The suit was brought against 125 persons, presumably the whole of the khaikari body. The suit seems to have been brought under serial no. 2[ (*e*) of the first schedule of the Kumaun Rules which covers a suit for the determination of any other incident of the tenancy.

Apparently the plaintiff had had trouble with the khaikars as regards his rights and decided to get the matter settled at one full swoop. All the three courts have come to the conclusion that the village has lost its character of pakka khaikari one by continuous, extensive and sustained invasions, of the khaikars' rights and I do not propose to go into this question. The only legal point raised is that contained in the first ground of appeal, viz. that the suit was not cognizable by a revenue court but by a civil court.

A judgment of the Board in a suit brought under serial no. 16 joined with serial no. 21 was apparently cited in the court of the learned Commissioner (Thakur Prem Singh, etc. *versus* Tilok Singh, etc., mauza Mahroli, Talla Chaukot, Almora District, dated September 16/22, 1935), in support of the contention that such a suit as this is triable by the civil courts. There is nothing in that judgment to justify this view nor, as I shall presently show, am I able to hold that such suits as can be filed relating to these matters are triable by the civil courts. Moreover, if the appellants thought this was the case, they should have raised the objection in the court of first instance under rule 4 of the Kumaun Tenancy Rules. The application therefore really fails—but as the learned Commissioner's judgment raises the whole question whether such declaratory suits are admissible at all, the Board consider it desirable to set forth their considered views on the subject. The learned Deputy Commissioner in charge thinks that suits for the determination of the

hissedars may in time make up that body of "continuous, extensive and sustained invasions" which under the case law of Kumaun may destroy the status of a pakka khaikari village.

In conclusion, the purport of the following remarks of the learned Deputy Commissioner in charge, Kumaun Division, are not clear to me. "It should be borne in mind that no suit for correction of papers lies in Kumaun except under one or other of the serials in Schedule A-I." *No suits for correction of papers lie even in the plains still less do they lie under the Tenancy Act.* The annual registers are corrected according to standing rules, but proceedings can be taken under the Land Revenue Act on the application of a person interested or on a report. The section relating to the recording of transfers and changes in that Act are applicable to Kumaun. The names of khaikars are so far as the Board are aware shown in the muntakhibs of khaikari villages whether pakka or kachcha. I do not see how these remarks affect the question of declaratory suits regarding the status of villages.

*The position then is that while declaratory suits regarding the status of khaikari villages as such cannot be brought under the Kumaun Tenancy Rules of* 1918 *either by the khaikars of a pakka khaikari village or the hissedars of a village* which they think is not a pakka khaikari village, suits as described in those serials can be brought under serial nos. 16 and 21 in which the question of the status of the village will inevitably be involved. Such suits must necessarily be brought in the revenue courts.

Though the application in revision fails on the only admissible ground on which it was brought, we would allow the revision on the ground that no such suit lay as that brought, and we would set aside the orders of all the lower courts and dismiss the plaintiff-respondent's suit with costs and Rs.25 pleader's fees.

D. L. DRAKE-BROCKMAN,
*Junior Member.*

*October* 19, 1934.

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## CHAPTER IV—Kachcha Khaikars

### IN THE COURT OF H. RAMSAY, Esq., COMMISSIONER, KUMAUN DIVISION

*Dated September* 4, 1878

REVENUE APPEAL NO. 55 OF 1878

Chhote, wife of Harak Singh, of Uprain Khet, Bachansyun, Garhwal ... ... *Appellant,*

*versus*

Jiva Nand and others, of Uprain Khet, Bachansyun, Garhwal ... ... ... ... *Respondents.*

*Held* by Sir Henry Ramsay, Commissioner, that a khaikar in a joint khata cannot give a Ladawa to the hissedar of the joint khaikari holding,

and that the shikmi khaikar who did not join in the Ladawa is entitled to take possession of the entire holding.

ORDER

Chhote is widow of Harak Singh, who was khaikar of Jiva Nand in 16/15/16 nalis in thok *hundu*. Pauliya, son of Harak Singh, gave a Ladawa of the whole of the khaikari land. Chhote, the widow, objects on the ground that she has a younger son and requires the land. If Pauliya did not want to cultivate the khaikhari land his younger brother had the right to all the land. Pauliya had no right to give it up by Ladawa. I therefore cancel the Ladawa and give Chhote decree for 16/15/16 nalis. She will arrange for cultivation till the younger son is old enough. Costs payable by Jiva Nand.

H. RAMSAY,
*Commissioner, Kumaun Division.*

*September* 4, 1878.

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IN THE COURT OF H. ROSS, ESQ., COMMISSIONER, KUMAUN DIVISION

*Dated August* 17, 1885

REVENUE APPEAL NO. 55 OF 1885

Ganeshoo and Kiroo, of Pokhari Sitonsyun, Garhwal .. ... ... ... *Appellants-Defendants,*

*versus*

Bali Ram Juyal of Pokhari Sitonsyun, Garhwal ... *Respondent-Plaintiff.*

*Held* by Mr. Ross, Commissioner, that a khaikar has a perfect right to mortgage his life-interest in his khaikari holding.

ORDER.

The order of the lower court is wrong. Bhima had a prefect right to mortgage his life-interest in his khaikari holding. Bhima's son must most distinctly succeed his father and inherit his holding.

Ganeshoo is nobody, he cannot trace his relationship to Bhimoo in any way. I accept the appeal and reverse the order of the lower court and declare Bhimoo's son to inherit his father's share. The lower court will appoint someone to act as sarbarahkar for the son until he attains his majority. It would be well to appoint this man in communication with the proprietor.

Respondent to bear cost.

H. ROSS,
*Commissioner, Kumaun Division.*

*August* 17, 1885.

PETITION NO. 1101 OF 1889

*Copy of Board's Order passed in the case of* DHARMA NAND *versus* KAMLAPATI *of Danga Silor, Almora*

*Held* by Mr. Robertson, Junior Member, Board of Revenue, North-Western Provinces and Oudh, that when the phant shows that the deceased khaikar and his brother had separate khatas; but the abstract of the settlement jamabandi (shikmi fard) while not containing the name of the deceased khaikar, has an entry that the brother of the deceased was joint with another khaikar in that khata, this fact coupled with the possession by the deceased brother creates a presumption that the said brother was joint in cultivation with the deceased.

ORDER.

Appellant states that he shared in the khaikari holding of his brother Bachoo Ram and that since the latter's decease (which according to Commissioner took place ten or more years ago) he has cultivated that holding. This latter point is admitted by respondent but he denies that appellant and Bachoo Ram cultivated jointly during the latter's life-time. In support of this statement there is the phant which shows the two as khaikars of separate holdings of 10-9-16 nalis each. No other evidence whatever has been produced on either side in the lower courts, but before this court the appellant has filed copy of abstract of settlement of jamabandi which does not show the name Bachoo at all, in the khaikars' column, but which contains the following entry, "Durga Datt is shikmi of Dharma Nand in the land of Bachoo's share." Taking this in combination with the admitted fact that for more than ten years after Bachoo's death appellant has cultivated the holding, I consider that the presumption distinctly is in favour of appellant's statement that he cultivated with Bachoo during the latter's lifetime. I, therefore, decree the appeal cancelling the decision of the Officiating Commissioner, restore that of the Deputy Collector which declared appellant to have khaikar's rights.

J. C. ROBERTSON,

*Junior Member.*

*August* 9, 1889.

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IN THE COURT OF D. ROBERTS, ESQ., COMMISSIONER, KUMAUN DIVISION

*Dated August* 22, 1892

REVENUE APPEAL NO. 14 OF 1892

Durga and others, Pokhar Sain Sabli ... ... *Appellants,*

*versus*

Jai Singh and Lacham Singh, of Sabli ... ... *Respondents.*

*Held* by Mr. Roberts, Commissioner, that a co-sharer cannot create khaikari rights in common land, because the khaikars' right must be in some definite area and not in an unseparated share of waste land. *Held* further that partition can only be demanded by co-sharers and not by tenants in common waste land.

JUDGMENT

By registered deed on August 23, 1887, Jeet Singh created Jai Singh his khaikar for the areas in his "Hissa Kabja" in Pokhar Sain and also included his share in the common land. The common land is 66-14-16 nalis and now Jai Singh sues the other co-sharers of the village for separation and possession of his share in this common land as khaikar under Jeet Singh.

The land is waste and Jai Singh admits he is not in possession.

A suit of this nature is inadmissible. A khaikar is a tenant and a khaikari created by deed is not established until possession of the land is given by the hissedar, who gives the land.

No co-sharer can create a khaikari right in common land because the khaikar's right must be in some definite area and not in an unseparated share of waste land. Again partition can only be demanded by co-sharers and not by tenants in common waste land. Until Jeet Singh or his representative has partitioned his share in the common waste land, his deed conferring khaikari rights on Jai Singh is inoperative and Jai Singh cannot maintain a suit for partition against the other co-sharers on the basis of that deed.

The appeal is granted and the suit is dismissed with costs.

D. ROBERTS,

*August* 22, 1892. *Commissioner, Kumaun Division.*

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IN THE COURT OF D. ROBERTS, ESQ., COMMISSIONER, KUMAUN DIVISION

*Dated September* 9, 1892

SPECIAL CIVIL APPEAL NO. 8 OF 1892

Gajai Singh Mahar, mauza Bawain, Khatsyun, Garhwal ... ... ... ... ... *Appellant,*

*versus*

Shri Ram and Ishwari Datt, Thapliyal, Srikot ... *Respondents.*

*Held* by Mr. Roberts, Commissioner, that there is nothing in Kumaun law to prevent a childless man from adopting one of his nephews and transferring his khaikari holding to him.

ORDER

The lower appellate court has not I think decided the case on the proper issue. There is nothing in Kumaun law to prevent a childless man from adopting one of his nephews. It is a likely thing for him to do. In a registered deed Harkoo declared that he had done this in respect of his nephew Gajai Singh and then he went on to transfer his holding to his adopted son. There is every reason to believe that his adopted son

has been in possession ever since, that is, since 1886. Harkoo died three years ago and the proprietor does not appear to have challenged Gajai Singh's succession. He now asserts that he has been in possession all along, but this I entirely disbelieve.

Under this view of the case I must disagree with the lower court and I decree this appeal and dismiss the plaintiff's suit with costs.

D. ROBERTS,

*September* 9, 1892. *Commissioner Kumaun, Division.*

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IN THE COURT OF V. A. STOWELL, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*Dated March* 4, 1907

CIVIL APPEAL NO. 11 OF 1907

*Instituted on* 1*st February*, 1907

Ratan Singh, of Jawar Patti, Langurpalla ... ... *Appellant*,

*versus*

Ranjit Singh, of Jawar Patti, Langurpalla ... ... *Respondent.*

Appeal against the order of Sayed Ahmad Ali, Assistant Collector, first class, dated the 10th January, 1907.

*Present*: Ratan Singh, Ranjit Singh

*Held* by Mr. Stowell, Deputy Commissioner, Garhwal, that a kachcha khaikar could mortgage his holding during his lifetime, but that this shall be void after his death.

ORDER

This case turns on the disputed point of Kumaun tenure as to whether a khaikar has the power to mortgage his holding or not, and if he does so whether the hissedar can have the mortgage set aside or not. In Mr. Pauw's remarks on the subject (page 47 of his Settlement Report) he evidently considers that the common practice of khaikar's mortgaging their holdings is a defensible one and should be allowed, but the only ruling he found on the subject was one of Sir H. Ramsay's cancelling such a mortgage and giving the land to the hissedar.

There is, however, a more recent ruling by Mr. Ross, Commissioner, in Kiroo and Ganeshoo, appellants-defendants *versus* Bali Ram of Pokhri, Sitonsyun (order of 17th August, 1888) in which he laid down "Bhimu had a perfect right to mortage the life-interest in his khaikari holding. Bhimu's son must most distinctly succeed and inherit his holding." As I have remarked in the Manual of Tenures, a ruling of Mr. Ross does not ordinarily carry the same weight as one of Sir H. Ramsay's but in this case when backed up by Mr. Pauw's opinion and the custom of the

country, it may perhaps be allowed to prevail; it is after all the more recent Commissioner's ruling.

In ingorance of its existence I have previously followed Sir H. Ramsay as quoted by Mr. Pauw, but I did so reluctantly.

I now follow the later ruling and hope that the case may be taken up higher for a further consideration of the point.

The plaintiff hissedar makes further allegations regarding his own possession in this land, but he has made no claim on this basis; he only claims to have the mortgage declared null and void as being *ultra vires* on the part of the mortgagor. Whether he has in fact been in possession of the land so that it has lapsed to his khudkasht is quite another question which is not raised in this case.

He can sue on that as a separate cause of action for a different relief, if he desires to do so.

I modify the lower court's order and grant plaintiff a decree declaring that the mortgage, if not previously redeemed, shall be null and void after the lifetime of the mortgagors, i.e. that only a life-interest in the holding has been mortgaged.

Costs on the parties in both courts.

V. A. STOWELL,

*March* 4, 1907. *Deputy Commissioner, Garhwal.*

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## IN THE COURT OF J. S. CAMPBELL, Esq., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated May* 27, 1907

SPECIAL CIVIL APPEAL NO. 6 OF 1907

Ranjeet Singh, son of Ajab Singh, of mauza Jawara, patti Langoor Palla, Garhwal ... ... ... *Appellant,*

*versus*

(1) Ratan Singh son of Maitab Singh of mauza Jawara, patti Langoor Palla, Garhwal (mortgagee), (2) and (3) Puran Das, and Alim Das, sons of Nidhi, of mauza Halsi, at present residing at Birmoli (mortgagors-*pro-forma*) ... ... ... ... *Respondents*

Appeal against the order of Mr. V. A. Stowell, Deputy Commissioner, Garhwal District, dated March 4, 1907.

Claim for cancellation of a mortgage-deed executed by a khaikar.

*Held* by Mr. Campbell, Commissioner, following Sir Henry Ramsay's ruling in Sheoraj Singh *versus* Amar Dev that the mortgage of khaikari holding is void.

ORDER

I am unable to agree with the Deputy Commissioner's finding in this case, and think that the court should depart from any ruling of Sir H. Ramsay, on questions of Kumaun custom with the greatest diffidence. Sir H. Ramsay laid it down definitely in Sheoraj Singh *versus* Amar Dev and others in his judgment, dated February 2, 1885, that the "the khaikari right is only heritable and not transferable. Respondents (i.e. the khaikars) can sub-lease their lands. They cannot transfer them by gift to others." The khaikars were in a stronger position in this case, as possession in the village was entirely khaikari. In Dhan Singh *versus* Nokandu, decided on August 22, 1873, Sir H. Ramsay writes that "If the khakars can mortgage, they can sell . . . . No such mortgages can take any effect on the khaikari land." The present case is a good instance of the undesirability of allowing the khaikar a right of transfer, even limited to his lifetime. Two young men aged 29 and 19 respectively, have given a usufructuary mortgage of their holding, framed in such terms as to amount to a conditional sale of their rights after four years. The hissedar set up a claim that the mortgagors had abandoned their holding and that he was in possession: but no issue was framed on this point and it was not definitely decided.

It is certain, however, that if the mortgagee is given possession on the strength of the mortgage and allowed to hold possession (if the mortgage is not redeemed) until the death of the mortgagor, the hissedar would find it very difficult (perhaps 40 or 50 years hence) to dispute his right to continue possession as a khaikar.

The rights of hissedars to take possession of the holdings of khaikars dying without heirs or abandoning their holding would be seriouly curtailed, if all such men were given a right of transfer in their holdings. I accept Sir Ramsay's definition of the status of khaikars in respect of their inability to transfer their rights.

I consequently reverse the Deputy Commissioner's order and find that the mortgage by Puran Dass and Alam Dass in favour of Ratan Singh is null and void.

Respondents will pay appellant's costs in all courts.

J. S. CAMPBELL,

*May* 27, 1907. *Commissioner, Kumaun Division.*

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IN THE COURT OF P. WYNDHAM, ESQ., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated October* 1, 1917

SPECIAL REVENUE APPEAL NO. 5 OF 1916-17

Madhav Singh, son of Debu Bhat, of mauza Dungri, patti Askot, district Almora ... *Appellant-Defendant,*

*versus*

Kunwar Gajendra Singh Pal, Rajwar Sahib of Askote, district Almora ... ... *Respondent-Plaintiff.*

Appeal against the order of H. A. Thomas, Esq., I.C.S., Deputy Commissioner, Almora District, dated April 26, 1917.

Claim for declaration of khaikari rights and compensation in case of ejectment for houses, gardens and improvements made by the appellant.

*Held* by Mr. Winter, Commissioner, that khaikars in Askot Taluka are not entitled to khaikari rights in extensions of the original holdings and are not entitled to compensation for such extensions.

ORDER

There are two questions involved in this second appeal.

(1) Are khaikars in Askot entitled to khaikari rights over lands which are extensions of their original khaikari holding ?

(2) If not, are they entitled to compensation on ejectment from this extension ?

The judgment of my prodecessor Mr. Winter, no. 16 of 1907-08, put the first point clear. Khaikars in Askot have no khaikari rights over extensions.

As regards the second point—It appears that the appellant did not press the claim for compensation. This is clearly stated in the file and I regret I cannot act otherwise than hold the appellant to this statement.

This appeal is dismissed with costs.

P. WYNDHAM,

*October* 1, 1917. *Commissioner, Kumaun Division.*

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IN THE COURT OF H. K. GRACEY, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated June* 20, 1920

SPECIAL CIVIL APPEAL NO. 11 OF 1920

Shree Ram, Hari Prasad, Ram Prasad and Nand Lal, minor, guardian: Shri Ram of Godi Bari, patti Sila, and Musammat Parbati, wife of Bihari, of mauza Bhelda, patti Sila, Garhwal ... ... ... *Appellants-Defendants,*

*versus*

Ishwari Datt Pashbola, son of Sah Deb, of Godi Bari, patti Sila, district Garhwal ... *Respondent-Plaintiff.*

Appeal against the order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated January 21, 1920.

Claim for declaration of right over 371/11/16 nalis of khaikari land.

*Held* by Mr. Gracey, Commissioner, that the relinquishment of a kachcha khaikari holdings by a widow in favour of her collaterals not jointly cultivating with the deceased khaikar, is illegal and entitles the hissedar to take possession of the holding.

ORDER]

This is a second appeal against a decree for possession by hissedar of the khaikari land of the late Bihari. The appeal is argued upon two points. The first is that the defendants who are nephews were in joint cultivating possession with him during his life-time. This is a question of fact and has been decided against the appellants on reasonable evidence. I am unable to disturb this finding of fact in second appeal. The second point urged is that the village is a pakka khaikari one and, therefore, the respondent is unable to obtain possession of any khaikar's land. This point was not urged as a part of the original defence and only mentioned for the time before the court of first appeal. It was rightly rejected.

I am therefore unable to interfere and the appeal is dismissed without costs as the respondent has failed to appear.

H. K. GRACEY,

*Commissioner, Kumaun Division.*

*June* 25, 1920.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated April* 1, 1926

SPECIAL REVENUE APPEAL NO. 2 OF 1925-26

Padam Singh, Gangi Nath and Madan Singh of Matt, patti Khasparja, Almora ... *Appellants-Defendants,*

*versus*

Kishana, Ratan Singh, Tilok Singh, Naryan Singh and Sobia of Matt, patti Khasparja, Almora ... ... ... *Respondents.*

Appeal against the order and decree of H. Ruttledge, Esq., I.C.S., Deputy Commissioner, Almora, dated August 7, 1926.

Claim for declaration title to and recovery of possession of Re.0-10-6 revenue-paying land in M. Matt, a kachcha khaikari village.

*Held* by Mr. Stiffe, Commissioner, that where the rent and the malkana of each khaikar in a joint khata is split up, though the revenue payable by the hissedars is not so divided in such a case, when a kachcha khaikar dies without issues a collateral heir, who is jointly recorded in the deceased whose holdings had been separated by private partition, cannot succeed to the khaikari rights of the deceased khaikar. The mere fact that the collateral had been helping the deceased and in cultivation does not amount to joint cultivation which, in such, cases means jointly to pay rent.

ORDER

Plaintiff-respondents are khaikars in a kachcha khaikari village and now sue for declaration their right to succeed their uncle deceased on the ground that they are collaterals and share in his cultivation. The hissedars defendants-appellants oppose the claim on the ground that the cultivation was not shared.

Except as regards possession, the facts are most unusually clear being mostly admitted on both sides. The deceased khaikar is Bir Singh and the father of the plaintiff is Jaman Singh, his brother. There is another brother Gaje Singh, it is admitted that a private partition took place between these brothers and this was presumably operative until the death of Bir Singh. About two years before that Bir Singh got old and feeble and it is admitted that the plaintiffs (his nephew) assisted him in the cultivation and after his death assisted his widow until she left the village. The lower courts seem to me to have misrepresented the evidence of the phant. It is true that the whole holding bears one no. 13 that omitem of revenue is assessed on no. 13 as between the hissedar and Government, but as between the khaikar and hissedar revenue *plus* the malkana is split into Rs.31 and Re.1-5-3. Counsel for the respondent of course argues that the whole body of khaikars are jointly and severally responsible for the Rs.4-5-3 but he can point to no authority for this and I should think that the argument is to the last degree doubtful when the revenue authorities have at settlement allowed a separate record of the two parts of the revenue *plus* malkana. I do not think that any court would recognize the joint responsibility. This brings us to Mr. Stowell's Manual, pages 78 and 79. Mr. Stowell admits that different views have been held by different officers as to what constitutes joint cultivation and appears himself to be inclined to clear that joint cultivation means not only that both parties have taken part in the ploughing or sowing of the land but that a joint responsibility for the rent is an essential feature in the "joint cultivation." In this case I hold that in view of the entry recorded in the phant, there was no "joint cultivation" within the meaning of Kumaun law, but only assistance in cultivation. On these grounds I accept this appeal with costs.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

*April* 1, 1926.

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IN THE COURT OF N. C. STIFFE, ESQ., O.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated December* 16, 1926.

SPECIAL REVENUE APPEAL NO. 2 OF 1926-27.

Murkhulya Malguzar, Nathu Malguzar and others of mauza Sari, patti Dasjula, Nagpur, Garhwal... *Appellants-Defendants*

*versus*

Chuyan, Ram Chandra and others of the same place ... ... ... ... *Respondents.*

Appeal against the order and decree of Lala Prem Lal Sah, Personal Assistant to Deputy Commissioner, Garhwal, dated August 27, 1926.

Claim for declaration of right over a plot.

*Present and heard:*

Pandit Tara Datt, Rai Bahadur, Vakil for Appellants.

Pandit Ansuya Prasad, Vakil for Respondents.

*Held* by Mr. Stiffe, Commissioner, that a tenant who reclaimed and has been in long possession of parti-qadim land in a kachcha khaikari village acquires khaikari rights over it, Board's ruling in Murti *versus* Uttam Nath relied on.

ORDER

Chuyan and other tenants sue for what is practically a declaration of occupancy rights against the defendant-appellant hissedars who have tried to eject them from a holding of parti-qadim. The facts are not in dispute and the case practically depends on the reading of the decision in Uttam Nath versus Murti. The land in dispute is parti-qadim and there seems no doubt that the tenants broke it up some 30 years ago, made it fit for cultivation and have cultivated it ever since. There is on the record a khaikari likhat which is not valid to prove an ordinary khaikari right as it is not registered. It is one of that class in which the tenants were to ask to have their khaikari rights recorded at the next settlement and as the next settlement is now on, the hissedars have tried to get out of it by ejecting the tenants.

It is agreed on all hands that tenants so situated in Government benap would not be liable to ejectment. The question is whether this principle applies to parti-qadim I have before me the full judgement of Mr. Reid in the case quoted and of the Board of Revenue also Mr. Robert's instructions to the then Settlement Officer. In deciding Uttam Nath *versus* Murti, the Commissioner clearly laid down that it was only in the settled and assessed lands that the so-called landholders have complete and undivided proprietary rights. The Board actually quoted this sentence but in their finding did not make specific mention of "assessed land." I venture to think that it is possible that the Board did not know that there was such a thing as measured and assessed land and did not appreciate the importance of the point.

When Mr. Roberts laid down the principles to be observed at settlement he definitely stated that his reason for so doing was the ruling in Murti *versus* Uttam Nath; but he also did not distinguish between assessed and unassessed measured land. Mr. Stowell in summing up the situation on page 99 naturally appreciated the points and so to speak restores the rulings of Mr. Reid by definitely distinguishing between assessed and unassessed waste. I have not the slightest doubt that he is correct. For this purpose I hold that there is no difference between

benap, Kaisar-i-Hind and parti-qadim. In consequence I hold that the lower appellate court has come to a right decision in holding that these tenants are not liable to ejectment and I dismiss the appeal with costs.

N. C. STIFFE,
*Commissioner, Kumaun Division.*

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IN THE COURT OF N. C. STIFFE, ESQ., C.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

SPECIAL REVENUE APPEAL NO. 9 OF 1926-27.

*Dated June 9, 1927.*

Bahadur Singh, Mangal Singh of mauza Siral-gaon, patti Maniyarsyun, Garhwal ... *Appellants-Defendants,*

*versus*

Shankar Singh, and others of the same place *Respondents-Plaintiffs.*

Appeal against the order and decree of Lala Prem Lal Sah, B.A., Deputy Commissioner, Garhwal, dated January 17, 1927.

Claims for declaration of right in respect of 35—4—16 nalis of khaikari land which the defendants got recorded in their names.

*Held* by Mr. Stiffe, Commissioner, Kumaun, that hissedar who has accepted rent for over 12 years from a collateral heir of a kachcha khaikar, who abandoned the holding in favour of such heir is stopped from ejecting such khaikar.

ORDER

Balbir Singh, etc, claim for declaration of khaikari right in 30 nalis of land against the zamindar Bahadur Singh. The facts are clearly stated in detail in the judgments of the lower courts. The holding originally belonged to one Sobnu who had six sons. The plaintiffs represent three of those sons they have undisputed khaikari rights in three holdings of their own parents and grandparents—The dispute is as to their status in the other three holdings of Mangal Singh, Dablu and Kirtu. It appears that some 50 years ago Mangal Singh, etc. left the village presumably as the holding was not big enough for the increasing families of the original six sons. These three went to another village tranferring thereon holdings to the other three branches—predecessors of plaintiffs. It has not been held to be proved that the family was joint at the time, and I therefore presume that had the zamindar objected at that time the present plaintiffs would have been held to have no more than sirtani rights in the holdings abandoned by their brothers and cousins—I say abandoned as they had no legal power to transfer the khaikari holding. However, the zamindar took no action for 20 years, when he made an unsuccessful attempt to eject them in the case decided by Mr. Allen, and quoted throughout the judgment. After that defeat he again took no action for another 20 years when in 1923, he arranged a mutation of

names, which undoubtedly led to the present suit. Whatever were the rights of the zamindar to hold the plaintiffs to be no more than sirtans in the abandoned holdings 50 years ago, I take it that by accepting rent at khaikari rates for 20 years he undoubtedly gave his "tacit consent" to the khaikari status of the present plaintiffs. Mr. Stowell discusses on page 79 such a case of his Manual and quotes rulings; and I have no doubt that the same principle ought to govern this case of irregular transfer.

This matter cannot be treated entirely as *res judicata*, as Mr. Allen's judgment does not clearly show that the plaintiffs were held to be khaikars in the land in suit. He dealt with the khaikari body as a whole: but it does not now lie in the power of the zamindar to try to oust persons whom he had treated as his khakari tenants for many years. I therefore agree with the lower appellate court, and dismiss the appeal with costs.

N. C. STIFFE,

*June* 9, 1927. *Commissioner, Kumaun Division.*

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IN THE COURT OF L. M. STUBBS, Esq., C.S.I., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated August* 29, 1933

SPECIAL REVENUE APPEAL NO 18 OF 1932-33

*Instituted on July* 13, 1935.

Appeal against the decree/order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated April 25, 1935.

Bachia Bora, Mohania, Motiya and others, village Salyura, Rithagarh, district Almora .. *Appellants-Plaintiffs,*

*versus*

Padua, Nadua of Chamuwan Darun, Panua, Uttrmiya of Salyura, Rithagarh, Almora *Respondents-Defendants.*

Claim for cancellation of khaikari deed gift, dated December 20, 1930.

*Held* by Mr. Stubbs, Commissioner, that in the case of a joint khaikari holding held under a contract from the hissedar, if one co-khaikars transfers his share to an outsider the other co-khaikars have a right to object whether such cokhaikar is a relation of the khaikar who transfers or not.

ORDER

As I understand this case it is quite unnecessary to go into the question of khaikari rights as a matter of principle.

The land in suit was a joint holding held under a contract with the hissedar dating from 1901.

The holders are joint holders as tenants—there is no specification of holding though they are entered as holding shares which are defined. The fields would naturally be held separately as a matter of convenience but the liability for rent is joint and it has been jointly paid.

On this contract the share of one partner is as good as the share of another and it would make no difference whether the partners were of one family or one caste or of one creed or not.

As a matter of fact there does appear to have been a transfer by inheritance in separate shares but that again may have been due to convenience or acquiescence.

But when it comes to transfer outside the coparcenary body of contractors the question is of a different kind altogether and the surviving or remaining partners are entitled to object.

In fact as I have said this is not question between the khaikari body as reversioners and the alternate right of the hissedar at all nor is it a question of succession by khaikars who are related shikmis.

It is a question of contract between the hissedar and the tenant in which the hissedar is just as much bound as the tenant. So long as this contract to pay rent to the hissedar remains and so long as the liability to pay rent jointly is discharged, the contract subsists and the tenants who pay the rent maintain the tenancy so long as they have heirs. On this finding the appeal must succeed and it is decreed with costs throughout. The order of the lower appellate court is quashed and the order of the lower court is restored.

L. M. STUBBS,

*August* 29, 1935. *Commissioner, Kumaun Division.*

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## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated August* 28, 1934

MISCELLANEOUS REVENUE APPEAL NO. 70 OF 1933-34,

*Instituted on February* 13, 1934,

Appeal against the order and decree of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 6, 1934.

Siv Ram, Atma Ram and others of village Dewal, patti Pindarwar Palla, Garhwal ... *Appellants-Defendants,*

*versus*

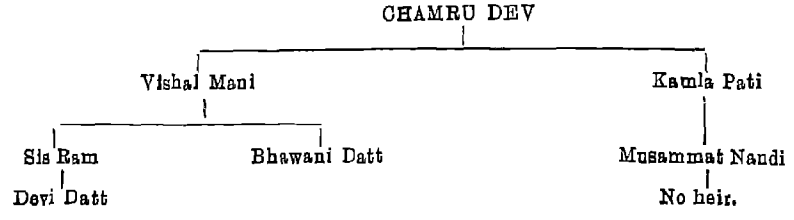
Bhawani Datt, Devi Datt, and others of the same place .. ... ... *Respondents-Plaintiffs.*

Regarding declaration of right and cancellation of deed of relinquishment executed by Musammat Nandi under Kumaun Tenancy Rules.

*Held* by Mr. Owen, Commissioner, that if two brothers are recorded as joint khaikars in a joint khata, but the shikmi fard shows them, as two separate families the presumption is that they have no joint cultivation and one brother or his widow can relinquish his or her holding in favour of the hissedar.

ORDER

Bhawani Datt and Devi Datt sued Musammat Nandi, widow of Kamlapati, for cancellation of a deed of relinquishment of khaikari land executed by her in favour of a number of hissedars. The court of first instance dismissed the suit. The Deputy Commissioner set aside this order on the grounds that the khata was a joint khata and the whole transaction was of a suspicious nature. Musammat Nandi is now dead; but the hissedars in whose favour the deed of relinquishment was executed have appealed. A brief pedigree is necessary if the case is to be properly understood :




There is no doubt that at one time the khata in suit was one and undivided ; but in the *fard shikmi* of Mr. Pauw's settlement the entry is shown as Bishal Mani and Kamla Pati " baraber ke bantdar ikhatte darj hain. Mawasa do. "

In Mr. Ibbotson's phant the khata is shown as one ; but the following shares are recorded :

Kamla Pati ½, Bhawani Datt ¼, Devi Datt ¼.

The first question is this " is the land in suit held jointly or separately? " The court of first instance thought it was held separately. The lower appellate court thought that it was held jointly.

The probability is that the first court was right. Khaikars and hissedars bear very much the same relation to each other so that Stowell's note on joint hissedari holdings must with certain reservations be intended to apply equally to khaikars. He remarks that the hissedars are very slow to get proper partitions made but that it is usual for the land to be divided up by private arrangement into shares made up of specific plots.

So when the brothers were alive they were " entered as sharing jointly though the families had separated. " That is I suppose the meaning of the somewhat eryptic entry in Mr. Pauw's *shikmi fard*. At any rate the entry of specific shares seems to support to this.

Differing from the lower appellate court, therefore, I would hold that although no formal partition had taken place the land was in point of fact held separately by the two branches of the family.

The next question is whether Bishalmani's branch of the family was entitled to bring a suit for cancellation of the deed of relinquishment. Musammat Nandi was a Hindu widow and therefore had a life-interest only in the holding. In Kumaun it is settled law that before a khaikar collateral can inherit he must prove that Bhawani Datt and Devi Datt had joint cultivation with Kamla Pati, the last full khaikar. I can find no evidence in support of this. Unless the hissedar consented to, therefore, this branch of the family could not succeed to the holding which would ordinarily go to the hissedar. In this case the strongest evidence is that of the actual cultivator of the land who says that he is cultivating on behalf of the hissedar. This has been an unsatisfactory case, but the onus lay on the respondents who wanted to get the deed cancelled and I do not think they have been able to prove satisfactorily that the holding was a joint one. Unless this is done the deed cannot be cancelled.

The appeal is allowed with costs.

L. OWEN,

*Deputy Commissioner, in charge,*
*Kumaun Division.*

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## CHAPTER V—Sirtans

### PETITION NO. 469 OF 1889

*Copy of Board's order no.* 1-89, *dated January* 21*st*, 1891, *to the Commissioner, Kumaun Division*

Case of Murli, etc. of mauza Dooli, patti Dhangoo, pargana Ganga Salan, zila Garhwal, *versus* Uttam Nath.

Returns the enclosures received with his no. 1690/II—110, dated May 20, 1889 and forwards for information communicating a copy of the Board's Order passed in the above case.

Copy of Board's orders passed on the petition no. 469 of 1889 in the case of Murli, etc. of mauza Dooli, patti Dhangoo, pargana Ganga Salan, zila Garhwal *versus* Uttam Nath.

*Held* by Mr. Kaye, Senior Member, Board of Revenue, that there are no rules in Kumaun regarding the cultivation of waste lands by sirtans and that in the absence of such rules a sirtan who has reclaimed an Alag chak of waste unassessed lands which belongs to Government and has held it for more than 20 years acquires occupancy rights in it. The court dissented from the previous ruling of Mr. Daniel, Member of the Board of Revenue, in the case of Lal Singh *versus* Amar Singh and others, decided on August 13, 1887.

*Note* —This is the leading case on the subject.

Appellants are proprietors of the village. Respondents are tenants who more than 20 years ago broke up and brought under cultivation certain lands within the limits of the village which were recorded as waste

at settlement. On the land so broken up they built their dwellings and cattle sheds. Of these buildings they are still in possession but from the cultivated portion of their holdings they have been dispossessed by the appellants. Respondents sued to recover possession.

The first court dismissed the suit on the ground that no right of occupancy had accrued. The Commissioner reversed that decision on the grounds that it is only on settled and assessed lands, that the so-called land-holders have complete proprietary rights, that waste uncultivated land is strictly speaking the property of the State and that with regard to such land there is no law or custom in Garhwal which leaves an improving tenant who has been in possession for a sufficiently long time at the mercy of the land-holders. This suit raises the whole question of occupancy right in Garhwal, regarding which no very definite rules appear to exist. The matter is further complicated by a decision of Mr. Daniel the late Senior Member, quoted in the margin. By that decision Mr. Daniel, laid down that there is no law or custom in Garhwal according to which tenants-at-will acquire occupancy rights after 12 years' continuous possession.

A date was fixed for the hearing of this case at Naini Tal, but the parties failed to appear. In considering the question raised I have consulted all the extant settlement reports for Kumaun and Garhwal and verbally discussed the matter with Sir Henry Ramsay, the late Commissioner. The fact appears to be that when Messrs. Traill and Batten and to some extent also Mr. Beckett made their settlements tenants were scarce in the hill tracts and the question of occupancy right received little attention. Only three classes of tenants are referred to in the settlement reports—(1) khaikars, who have a permanent and hereditary right to hold their land at a fixed rate, but have no power of transfer, (2) paikasts, who practically hold their land on the same terms as khaikars, (3) sirtans, who are described in the later settlement reports as tenants-at-will. Now the so-called tenant-at-will is thus described in paragraph 27 of Mr. Beckett's Garhwal Settlement Report: "The sirtan has no permanent right whatever; he makes his own arrangements with the proprietor usually only for one crop. He pays in money or in kind and sirtans are not entered in the records of rights."

In paragraph 9 of his review of Mr. Beckett's report Sir Henry Ramsay writes, "the sirtan tenant corresponds with the tenant-at-will of the plains and as a general rule holds by an annual written agreement." The above extracts show that sirtan or so-called tenant-at-will of the hills is a purely temporary occupant of the land in the possession of proprietors and must not be confounded with tenants who have broken up and brought under cultivation waste land and have continued to occupy uninterruptedly through a long series of years. As far as I can discover Mr. Reid is right in holding that there is no law or custom in Garhwal according to which such tenants are liable to ejectment at the will of the land-holder within whose limits the land they cultivated lies and I would dismiss the appeal preferred against his order. As however that

order is in direct conflict with Mr. Daniel's decision quoted above, I forward the case for the concurrence of the Senior Member if he sees fit to concur in the order proposed.

W. KAYE,
*Offg. Senior Member.*

*November* 8, 1890.

I CONCUR.

J. J. LUMSDEN.

*November* 12, 1890.

I GIVE order accordingly.

J. R. REID.

*December* 9, 1819.

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## IN THE COURT OF E. K. PAUW, ESQ., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*Dated July* 30, 1896

REVENUE APPEAL NO. 9

*Instituted on June* 30, 1896

Balwant Singh of Biyansi Bungi ... ... *Appellant-Plaintiff,*

*versus*

Bhanu, next friend of Madhu, minor ... *Respondent-Defendant.*

Appeal against the order of Pandit Jai Dutt, dated June 8, 1896.

*Held* by Mr. Pauw, Deputy Commissioner, Garhwal, that a gift of land to the *pujari* when of very longstanding has the effect of giving the holder of the land a right of occupancy.

ORDER

Plaintiff-appellant's only ground of appeal is that the gift of land to the *pujaris* of Jaset-ki-devi was revocable and that he having brought the whole villagers is entitled to revoke it. The statement that Madu has no right of succession is disposed of by the evidence taken in the lower court whence it appears that Kalmu Madhu's father was appointed pujari by plaintiff's own grandfather.

In my opinion this gift of land to the *pujaris* of Jasoli-ki-devi being of very longstanding mentioned in the settlement papers has the effect of giving the holders of the land a right of occupancy. The appellant has produced no evidence to show that by the custom of Garhwal such grants are revocable; the Deputy Collector is clearly of the contrary opinion. The land may lapse to the appellant like a khaikari holding on

the extinction of the line of *pujaris*; but I do not think he is entitled to such against an existing incumbent.

Appeal dismissed with costs.

(Sd) E. K. PAUW,
*Deputy Commissioner, Garhwal.*

*July* 30, 1896.

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IN THE COURT OF E. C. ALLEN, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

REVENUE APPEAL NO. 10

*Instituted on September* 10, 1904

Gabar Singh, Bhajan Singh, Partab Singh, Ranjit Singh, Fata Bhandari, village Kotgi, Bhatwari Dasjyula ... ... ... *Appellants-Plaintiffs,*

*versus*

Netarmani Semwal, son of Srinand Bhatwari Dasjyula ... ... ... *Respondent.*

Appeal against the decree of Pandit Dharmanand Joshi, Deputy Collector, dated August 4, 1904.

*Held* by Mr. Allen, Deputy Commissioner, Garhwal, that a *pujari* appointed by punch hissedars who (in lieu of services to the deity) dedicate the lands which the *pujari* holds have right to eject him as a sirtan even if he and his ancestors have held the land for considerable time.

JUDGMENT

It does not seem necessary for the purpose of deciding this appeal, to go into the whole history of the case, which goes back 20 years or more.

The bare facts are that in Bhatwari there is a plot of land dedicated to Bhumaia Deota, the area of which was given as 30 1/16 nalis in the old settlement papers. It was entered in the name of "shamilat deh" as proprietors and Anandu grandfather of defandant-respondent, as sirtan.

Anandu held this land as *pujari* to the Deota doing service as *pujari* in lieu of rent. In 1885 the proprietors apparently took steps to eject Anandu who thereupon filed a suit against them to have his occupation in the land confirmed. He won his case, but the Commissioner when deciding the appeal wrote: "the lower courts have found that the office of pujari once conferred is good for the life of the incumbent so long as he performs his duties properly, but that at his death the village community (plaintiff-appellant in the present case) have the power of appointing his successor. The conclusion appears just and reasonable."

From this ruling it seems to me perfectly clear that, Anandu having died last February, the decision as to who is to succeed him rests entirely with the appellants or rather with the proprietors, and that without their consent no one can be *pujari* or claim to have any rights to carry on the duties of *pujari*. Of the six proprietors the five appellants

wish to appoint or have already appointed one Shib Ram as *pujari* and only one, Umrao Singh wishes respondent (Anandu's grandson and heir) to be appointed. Thus the appointment of respondent, as *pujari*, or the performances by him of the duties of *pujari* is contrary to the wishes of a large majority of the proprietors.

In the next place there is no evidence to show and the Commissioner's ruling quoted above contradicts the supposition; that the office of *pujari* is hereditary in this case. Therefore if respondent is, as he asserts, carrying on the duties of *pujari*, without having been appointed pujari by the proprietors and against the wishes of the majorty of the proprietors, he is doing so without a shadow of right. The Commissioner's words were: "The office of *pujari*, once conferred. . ." But in this case it has not been conferred.

Lastly respondent not having been lawfully appointed *pujari* and having no hereditary or other title to the post of *pujari*, has the ordinary status of a mere sirtan in this land. It has not been suggested that any compensation is due to him on account of improvements effected in the land by him or his predecessors. He can therefore be dispossessed by the proprietors whenever they please, no matter how long he or his predecessors in interest have been in possession of the land.

It should also be noted that the lower court appears to be wrong in saying that at the previous settlement the land was "be parat, and unassessed to revenue," since the Commissioner in his order of December 8, 1888 very clearly wrote: ". . . . land (the land in question) for which the malguzars are assessed to revenue." I also find it is included in the assessed area of Bhatwari. It was certainly assessed to revenue at the recent settlement as even respondent himself admits.

This fact only serves to define respondent's status more clearly as that of a mere "sirtan." The appeal must therefore be allowed, and plaintiff-appellants will be given a decree for the ejectment of defendant-respondent from the land in question accordingly. Respondent will pay all costs in both courts. The lower court's decree gives no particulars of the cost incurred in connexion with the original suit. Particulars of these should have been entered in full even though the suit was dismissed, and plaintiffs ordered to pay their own costs.

E. C. ALLEN,

*Deputy Commissioner, Garhwal.*

*October* 7, 1904.

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IN THE COURT OF A. M. W. SHAKESPEARE, Esq., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated May* 9, 1905

SPECIAL REVENUE APPEAL NO. 2 OF 1904-05

Netra Mani Semwal of M. Kothgi, patti Dasjula *Appellant-Defendant,*

*versus*

Gabar Singh, Bhajan Singh, Pratap Singh, Ranjeet Singh and Phatta Mouza do ... *Respondents-Plaintiffs.*

Appeal against the order of E. C. Allen, Esq., Deputy Commissioner Garhwal District, dated October 7, 1904, to have the decree for ejectment of appellant from 41 10/16 nalis of land in mauza Bhatwari granted to respondents, set aside.

Pandit Tara Datt for appellant. Pandit Jwala Datt for respondents.

*Held* by Mr. Shakespeare, Commissioner, that a *pujari* who is recorded as a sirtan of the land attached to the office of pujari cannot be ejected by the revenue courts.

JUDGMENT

This is a special revenue appeal. The only question is whether the suit was rightly brought in the revenue courts. It is called ouster of defendant (appellant) and the defendant was alleged to be a sirtan tenant.

But it is obvious to me he is not in possession of the land as a sirtan tenant. But he is in possession as alleged heir to his father Sri Nand who was *pujari*.

Whether his allegation that he is heir to Sri Nand is correct or incorrect it is obvious that the land is attached to the office of *pujari*, and the defendant-appellant cannot be ejected by the revenue courts.

I therefore allow the appeal and restore the order and decree of the court of first instance with costs in all courts.

A. M. W. SHAKESPEARE,
*Commissioner, Kumaun Division.*

*May* 9, 1905.

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IN THE COURT OF P. WYNDHAM, ESQ., C.I.E., I.C.S., OFFICIATING COMMISSIONER, KUMAUN DIVISION

*Dated June* 27, 1914

SPECIAL REVENUE APPEAL NO. 2 OF 1913-14

Nain Singh of mauza Matoli, patti Bali Kandarsyun, Garhwal (tenant) ... ... *Appellant-Defendant,*

*versus*

Sher Singh, Dhan Singh and others of mauza Kalon, patti Kandarsyun, Garhwal (hissedars) ... ... .. ... *Respondents-Plaintiffs.*

Appeal against the order of Mr. J. M. Clay, I.C.S., Deputy Commissioner, Garhwal District, dated September 22, 1913, to set aside the order of ejectment and that the compensation awarded to appellant, defendant is not sufficient.

*Held* by Mr. Wyndham, Commissioner upholding Mr. Clay's order that sirtans of longstanding are entitled to compensation for houses and extensions of cultivation adjoining their sirtani fields.

ORDER.

This case was argued before me in January, but as I was new to Kumaun and had to read up the revenue laws the case has been postponed for judgment.

This is a suit for ejectment. The defendants-appellants allege they are not mere sirtans (tenants-at-will) but khaikars (occupying tenants).

They further allege that the compensation granted them for improvements is not adequate.

The circumstances of the case are fully described by the learned Deputy Commissioner.

The file shows that defendants-appellants are sirtanas on measured lands and extensions of such lands and that they have been long in possession. I have read many rulings on the subject of acquisition of rights by sirtans but these all apply to unmeasured lands and not to lands which have been measured and settled with hissedars (as in this case) or to extensions of such cultivations.

Stowell's Manual, page 97, 98, 99, 68, 69, 70, makes this point quite clear. I must uphold the learned Deputy Commissioner in his finding that the defendants-appellants have no khaikari rights and are not exempt from ejectment, they are only sirtans on measured lands and extensions of such and as such can be ejected. That the extensions are not separate cultivation but mere adjuncts to old cultivation is clearly shown by the Deputy Commissioner who under the Kumaun Rules, page 10, rule 29, made a local inspection though he was an appellate court.

The only other point for determination is the question of compensation. The court of first instance allowed no compensation for houses. The learned Deputy Commissioner did.

The law on this point is quoted on page 102 in Stowell's Manual. In this case the houses are not on village waste but on measured land. In the hills substantial houses are a necessity. Mr. Robert's orders May 11, 1892 and January 9, 1893, are before me. In the former he refused to permit a sirtan to be ejected from his house without compensation in the latter he refused compensation but said the tenant was entitled to remove the materials.

I consider that under the circumstances detailed in this case the defendants-appellants are entitled to compensation for houses. They have been in the village for a long time. For such purposes, i.e., permanent cultivation substantial houses are necessary in these tracts. The finding of the lower appellate court that compensation for houses is permissible is upheld.

As regards the actual amount of compensation to be paid I must adopt the finding of the lower appellate court. The learned Deputy Commissioner has visited the spot and has had every opportunity of coming to a right valuation. This appeal is accordingly dismissed.

This order will govern cases no. X given in the margin.

As regards costs in the lower courts, they will remain as ordered. Costs of these will be borne by parties.

P. WYNDHAM,

*Offg. Commissioner, Kumaun Division.*

*June* 27, 1914.

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PETITION NO. 3 OF 1914-15

*Copy of Board's order passed in the case of* NAIN SINGH MUKHTAR, *appellants* versus SHER SINGH, *respondent, resident mauza Matholi, patti Bala Kandarsyun, district Garhwal.*

Appeal from the order of the Commissioner, Kumaun Division, dated June 27, 1914, in the case of ejectment.

*Held* by Mr. Campbell, Junior Member, Board of Revenue, that on ejectment, sirtans were entitled to compensation for their houses and other improvements in their holdings.

ORDER

No third appeal lies, but I have inspected the records, after hearing the parties, in my revisional capacity, under section 26 of the Kumaun Rules. I think that the orders of the Deputy Commissioner and Commissioner are perfectly correct, and that they have rightly decided that respondents cannot be ejected from their sirtani holdings until they receive compensation for the value of their houses and for the other specified improvements to their lands. This is not a case of a new tenant cultivating or being ejected from a few fields only and claiming compensation for an unnecessary big house which he had constructed at his own risk and with his eyes open to the chance of dispossession.

Respondents are tenants of large holdings which they and their ancestors have cultivated and improved for 30 or 40 years ; and the houses which they have built were absolutely necessary and not unsuited to their position. They are clearly entitled to compensation, now that the appellant is trying to turn them out of the village altogether. I therefore uphold the Commissioner's order and dismiss this application with costs.

This order will also govern nos. 4, 5 and 6.

J. S. CAMPBELL,

*July* 9, 1915. *Junior Member.*

## IN THE COURT OF H. A. LOMAS, Esq., I.C.S., DEPUTY COMMISSIONER, ALMORA

*Dated April* 25, 1916

REVENUE APPEAL No. 5 OF 1915

Mohan Singh, Jeet Singh Kathaiat and Sher Singh Kathaiat, sons of Narpat Singh, of mauza Koturah, patti Walla Ginwar ... ... ... ... *Appellants,*

*versus*

Madan Singh, Prem Singh and Jasodha Singh, sirtans of mauza Koturah, patti Walla Ginwar ... ... *Respondents.*

Appeal against the order of Assistant Commissioner, Ranikhet, *re* to take possession.

*Held* by Mr. Lomas, Commissioner, that a sirtan who has been in possession for over 30 years is entitled to compensation for the houses built by him on ejectment.

*Present* : Appellants and respondents.

ORDER

This case was decided by me on certain findings by the lower court on issue framed by my predecessor.

No written objection has been filed. I disagreed with one of the findings of the lower court, which was to the effect that defendant-respondent held khaikari rights and that if ejected he was entitled to Rs.372-7-11 compensation for improvements.

I held that respondent held no khaikari rights and that on ejectment he was entitled to the compensation.

I decreed ejectment on condition of the payment of Rs.372.

The grounds of appeal are not before me but my decree has not been set aside, and I am not quite clear how I could review or alter it.

At any rate the only point taken before me verbally is that a sirtan is not entitled on ejectment to compensation for a house and the only support for the contention is a brief judgment by Mr. D. T. Roberts.

The lower court has discussed this at length and I need only say that I agree with it. Respondent held the land for a great number of years. He built a house on it apparently 30 years ago and has lived in it ever since without any objection by the landlord.

It was the only house he had. He improved it in a rational manner. It is not contended that it is not worth the sum claimed. When the ejectment takes place it will lapse to plaintiff-appellant. It is only fair that he should pay for it. I confirm my previous judgment and decree, no further costs are claimable. I have already decided that parties pay their own.

H. A. LOMAS,

*Deputy Commissioner, Almora.*

IN THE COURT OF H. A. LOMAS, ESQ., I.C.S., DEPUTY COMMISSIONER, ALMORA

*Dated April* 26, 1917

REVENUE APPEAL NO. 4 OF 1917

Madhan Singh Bhat, son of Debu, mauza Dungari, patti Talla Askot ... ... *Defendant-Appellant,*

Kunwar Gajendra Singh Pal, Rajwar Sahib, Taluka Askot ... ... ... *Plaintiff-Respondent.*

Appeal against the judgment and decree, dated March 1, 1917, passed by P. Mason, ESQ., I.C.S., Assistant Commissioner, Almora.

*Held* by Mr. Lomas, Deputy Commissioner, that the khaikars in Taluka Askot acquire no khaikari right in the unassessed benap land. Their case is not that of ordinary village in Kumaun.

ORDER

Present appellant-respondent absent, but a perusal of the case and the argument advanced by the appellant combine to show that it is unnecessary to adjourn the case.

Appellant is butting against a stone wall. Relying on a remark of Mr. Goudge's in his settlement report which is not before me and to which the copy filed bears no relation he and others insist on maintaining that khaikars in Askot possess khaikari rights in benap land which they may break up. They rely on the fact that certain khaikari rights have been allowed in such land to khaikars elsewhere.

Every one of his arguments has been settled and disposed of in the exhaustive judgment of Mr. Winter in 1907-08.

Khaikars in Askot are not on the same footing as khaikars elsewhere in the district, no one has a right to any special status in benap land, such status may be conferred by Government as a concession. In Askot the concession has been given exclusively to the Rajwar Sahib and none of his tenants can acquire any right in benap but such as he choses to give.

He has given no right to appellants. If they, presuming on supposed rights, have spent money in bricks and mortar and improvements it is their look-out. They acquire thereby no special position.

The appeal fails and is dismissed with costs *ex parte*.

H. A. LOMAS,

*Deputy Commissioner.*

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IN THE COURT OF J. R. PEARSON, ESQ., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Decided on March* 16, 1925

SPECIAL REVENUE APPEALS NOS. 25 AND 26 OF 1925

Bhim Singh, of Nai Pinglapakha, district Garhwal ... *Appellant,*

*versus*

Jas Ram of Kilbas, patti Kimgaddigad, district Garhwal ... ... ... ... ... *Respondent.*

Appeal against order and decree of T.J. C., Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated May 17, 1924.

Claim for ejectment from 46 nalis of sirtani land under Kumaun Tenancy Rules.

*Present and heard* : P. Brij Mohan, Vakil and Mathura Datt, Vakil, for appellant, P. Tara Datt Gairola, Vakil, for respondents.

*Held* by Mr. Pearson, Commissioner, Kumaun, that tenants who are descendants of various khaikars who broke up the land and brought it under culttivation cannot, where the holdings have descended directly to them from their original cultivators, be ejected.

*See* my order of January 27, 1925. I have now heard arguments afresh and gone through all the available rulings. One preliminary point requires to be disposed of, though it was not raised in the memorandum of appeal either before me or before the Deputy Commissioner. It is urged that there is no proof that respondent Jas Ram in appeal no. 26 is a descendant of the tenants originally recorded as khaikars in 1862 but decided to be sirtans on appeal to Sir Henry Ramsay. This point is dealt with sufficiently by the Deputy Commissioner. There is at any rate *prima facie* evidence in this case that his status was not challenged on this ground in the trial court and the objection seems an afterthought.

I refuse to entertain it. As to the main question at issue whether these sirtans are liable to ejectment or not, as I have remarked in my previous order, the Deputy Commissioner's finding that they are Maurusi sirtans does not dispose of the case. I do not make out that the term "Maurusi sirtans" has any legal significance. It is used by Mr. Stowell on page 96 of his Manual. No remark there that the claim to occupancy right by these old hereditary tenants is not recognized by the courts and I gather from the rulings that it depends on the circumstances of the individual case. In the present case the main facts detailed in my order of January 27 are clear. It is admitted (1) that the tenants are descendants of the original owners who for some reason surrendered their proprietary right in 1844. The village was subsequently resettled by the ancestors of the appellants and according to the petition of 1861 translation of which, marked Ex. D, is attached to this judgment, the village lapsed into waste. The revenue assessment continued on it and the malguzar had to pay without return until the original owners came back. On appeal it is urged that they admitted that they had abandoned cultivation but the point is really immaterial to the decision. It is on record that the respondent's ancestors were the persons who brought the land into cultivation again (accepting the plea that it did lapse into waste). (2) The decision to record them as sirtans and not as khaikars was solely on

the ground that they had relinquished all rights in 1844 (*see* Ex. B, translation of Sir Henry Ramsay's Order of August, 18, 1862).

(3) Though there is a copy of unproved *likhat* on the file in which the tenants apparently agreed that they would be liable to ejectment (*see* Ex. A). This bears a date of 1855. The Assistant Collector and the Deputy Commissioner are wrong in dating it 1862 clearly even accepting this as proved it was drawn up prior to the proceedings of 1860 when the record peshkar recorded a note about these tenants (Ex. C attached). In this it is clear the then hissedar admitted that he had no claim to eject and would not. This seems to me clearly to override the *likhat* and I have for this reason thought it unnecesary to return the case for formal proof of this *likhat* though I did not think that lower courts are right in holding that reliance on it entailed altering the suit for simple ejectment to one for breach of conditions. Clearly the appellant relied on this as proof that the tenants were originally liable to ejectment. It is therefore clear that whether the respondent's ancestors retained cultivation continuously after they had surrendered their proprietary rights or broke up the land anew after it lapsed into waste, their descendants can claim to derive from the person who broke up the land and brought it under cultivation, either as original proprietors or as those who did so after the lapse into waste. I have been unable to find in my record room the records of the two orders of the Board of Revenue quoted on page 97 of his Manual by Mr. Stowell, but the case seems clearly similar to the case of Utam Nath *versus* Murti in which the Board rules that tenants who have broken up the land and brought it under cultivation and have continued to occupy uninterruptedly through a long series of years can claim occupancy rights.

Mr. Stowell on page 99 of his Maunal summarizes the rulings and adds a condition that the waste should have been unassessed and it is argued before me that revenue having been paid apparently continuously in this case, the waste land was actually assessed and rights therefore do not accrue. I cannot accept this argument, Mr. Stowell seems to have added this condition without authority and the Board's order of January 20, 1891, does not lay it so, nor does it appear reasonable that tenants' right could depend solely on whether the owner of the land was not paying Government demand on the waste which was being broken by tenants. Clearly on equitable grounds it is reasonable to distinguish between the rights of old hereditary tenants whose ancestors brought the land under cultivation and those not the decendants of persons who merely took up many years ago, measure and cultivated land and have continued to cultivate this land for a long series of years. The case dealt with by Mr. Wyndham in October, 1913, is clearly of the latter class. I have examined the records of the case which went up to the Board of Revenue in 1915 and find that in this case also there was no proof of the tenants having derived right from persons who originally broke up the land. In fact Mr. Wyndham's order of June 27, 1914, clearly distinguishes between the two classes. In the circumstances I find the lower courts are correct in holding that respondents are not liable to ejectment, they are

descendants of persons who broke up the land and brought it under cultivation and the holdings have descended directly to them from their original cultivators. Appeals are dismissed with costs.

J. R. PEARSON.

*March* 16, 1925. *Commissioner, Kumaun Division.*

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IN THE COURT OF CAPTAIN A. W. IBBOTSON, M.C., M.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated July* 22, 1929

MISCELLANEOUS REVENUE APPEAL NO. 24 OF 1928–29

Chandra Singh Rawat of village Bogi Bhanwasi, patti Ajmere walla, district Garhwal ... *Appellants-Cross-Objectors,*

*versus*

Deb Singh, Subedar, village Talli Bhanwasi, patti Ajmerewalla district Garhwal ... ... *Respondent-Opposite-party.*

Appeal against the order and decree of Lala Prema Lal Sah, Additional Deputy Commissioner, Garhwal, dated October 29, 1928.

Claim for declaration of rights over 5-8-6 nalis land.

*Held* by Captain Ibbotson, Commissioner, Kumaon, that a Judge cannot extend the time in appeals in which copy of the judgement of the trial court was not filed.

ORDER

A preliminary objection is made to this appeal by the respondent on the ground that the copy of the judgment of the trial court was not filed with the appeal. The Full Bench decision of the Allahabad High Court, on precisely a similar matter in Bhairon Ghulam and others *versus* Ram Autar Singh, *Allahabad Law Journal*, Vol. XIX, page 598, is put before me. It was held then by Full Bench on May 14, 1921, that Judge cannot extend the time in such a case and the only proper decision is to reject the appeal.

The counsel for the appellant cannot counter this argument and the appeal is therefore dismissed.

The cross-objection suffers from the same defect and is therefore similarly rejected.

Each party will bear its own costs.

A. W. IBBOTSON,

*July* 22, 1929. *Commissioner, Kumaun Division.*

PETITION NO. 2 OF 1930-31

*Copy of Board's order passed in the case of* ATMA RAM, *applicant*, versus LALU *and another, respondents, mauza Dharkot Dasjula Nugpur, district Garhwal.*

Application for revision of the order of the Commissioner of Kumaun Division, dated July 24, 1930, in the case of ejectment of sirtan.

*Held* by Mr. Oppenheim, Member of the Board of Revenue, that if a hissedar gives land to a tenant by an unregistered khaikari-likhat agreeing to have him recorded as a khaikar at the next settlement but makes no stipulation in the *likhat* about the payment of rent ; the principle of part performance does not apply to such a case as the conditions of the agreement are not definite as required under section 53A of the Transfer of Property Act.

In 1916 the petitioner who was a hissedar of the land in dispute gave the land to the opposite-party under an agreement the terms of which were embodied in an unregistered instrument. Previous to this the land had been occupied by other cultivators. He accepted nazrana on account of allowing the opposite-party to occupy the land and agreed that they were to continue to occupy it until the next settlement presumably as sirtans or tenants-at-will and promised that at the settlement he would accept them as khaikars and have them recorded as such. The settlement actually started in 1929. There was no clause in the agreement about the rent payable during the current settlement or about the rent that was to be payable as khaikari rent after the new settlement.

In 1920 the opposite party made an unsuccessful effort to get themselves entered as khaikars. In 1922 they brought a suit for a declaration that they were not "sirtans" but "khaikars." It was held that they were "sirtans."

The present suit was brought by the applicant. His allegation was that the opposite party had refused to pay any rent on account of this land. He asked for their ejectment as sirtans.

The Assistant Collector and the Additional Deputy Commissioner ordered ejectment on condition that the applicant paid to the opposite-party Rs.250 as compensation.

On second appeal the Commissioner held that the doctrine of part performance embodied in section 53A of the transfer of Property Act by the amending Act of 1929 applied to this case. He found that although a "khaikari" status had not been created, yet in view of the doctrine mentioned above the applicant was "stopped" from ejecting the opposite-party.

On revision it is urged that this doctrine does not apply to the present case.

I have read a number of decisions bearing on the doctrine and accept the view of the Commissioner that the principle embodied in section 53A cited above was good law even prior to the amendment of the Act. But in

this case all the conditions precedent to the application of that principle do not exist.

Section 53A says that " where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract.

In this case the terms necessary to constitute the transfer cannot be ascertained with reasonable certainty " nor can it be held that the transferee has performed or is willing to perform his part of the contract."

As already stated the original document contained no provisions about the rent which was to be paid up to the settlement or after the settlement. It is urged by counsel for the opposite-party that the arrangement was that his client were to pay no rent during the currency of the existing settlement and were to pay khaikari rent after that settlement. I do not think that it is possible to import this agreement into the document. It is difficult to reconcile the view that under the agreement no rent was payable in 1920 and 1922 with the litigation of those years when the people who according to this theory were entitled under the agreement to hold the land rent-free brought suits which, had they been successful, would have resulted in their having to pay rent as khaikars. Nor is there anything to show that the amount of rent payable by a khaikar at the settlement is an amount which never varies. It is urged on behalf of the applicant that it is sometimes 25 per cent. above the revenue and sometimes a larger amount. In any case in the absence of any evidence about the amount of rent payable by the opposite-party I am not prepared to hold that this agreement contained terms which could be " ascertained with reasonable certainty."

" The history of the case also does not show that the opposite party has performed or was willing to perform his part of the contract." According to the statement in the plaint which was not contradicted they have not paid any rent since 1920 when they first claimed to be entered as khaikars, nor are they willing to pay any.

There is the further consideration that the decision of the Commissioner not only nullifies the decisions of 1920 and 1922 it also leaves the parties in a very difficult position. The Commissioner held that the opposite-parties were not khaikars. He thought it possible that they might win a suit for a declaration that they held that status a possibility now is that they cannot be ejected from the land and that they are not bound to pay any rent on its account. It would thus be somewhat foolish on their part if they brought a suit for a declaration which would involve their having to pay some rent. Nor can I conceive what remedy the applicant would have in order to set matters right.

On the other hand the decision of the Additional Deputy Commissioner and the Assistant Collector was fair enough to every one. The idea which under lay the principle enacted in section 53A was to prevent a party

to a transaction deriving unfair advantage from it for a technical reason. In this case the decision of the two lower courts prevents this and is fair enough to everyone.

For these reasons I would set aside the order of the Commissioner and restore that of the Additional Deputy Commissioner and would direct that the opposite parties pay costs throughout and Rs.50 pleader's fee to cover pleader's fee in all courts.

OPPENHIEM,
*Member, Board of Revenue.*

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IN THE COURT OF L. M. STUBBS, ESQ., C.S.I., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

SPECIAL REVENUE APPEAL NO. 3 OF 1932-33

*Instituted on October* 20, 1932.

Ram Parshad and Ram Partap of village Margun, patti Rawatsyun, district Garhwal ... *Appellants-Plaintiffs,*

*versus*

Raghbanand, Deo Ram and others of mauza Luneta, patti Bangarhsyun, district Garhwal ... ... ... *Respondents-Defendants.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated August 22, 1932.

Claim for ejectment and recovery of price of grain under Kumaun Rules.

In 1859 the appellants' ancestors had or claimed some connexion with the village (which had never been settled before) which had been cultivated by the ancestors of the respondents but if they ever had khudkast he definitely abandoned it the village before Pauw's settlement, possibly from 1859 or possibly from a few years after 1862. Held by Mr. Stubbs, Commissioner that the respondents were maurusi sirtans and could not be ejected from their holdings.

ORDER.

This is a border line case in which the question is whether or not sirtans have proved that they are entitled to resist ejectment as maurusi or not.

It is a question of the value of the evidence as to length of tenure.

The extracts from the Becketts settlement entries are khasra footnote of April 18/19, 1859, Ekasami hai kul gaun wiran tha July 5, 1860, naksha 7, Basti nahin hai kul gaun jangli khata wiran kam kasht ziyada. Thora talaon hai. Wiran hai.

August 22, 1862, fard tafsil zamin.

August 26, 1862, hukmi band,

Gauri Datt Khanduri's name appears as hissedar. There is no tenant entered and the land is shown as khudkasht.

Some of the entries are certainly difficult to explain and it is not easy to understand how wiran kamkasht ziyada can be reconciled with the figures of cultivation on the rest of the entry.

Also talaon was 20 nalis odd then and is only 28 nalis odd now.

The word asami generally means a tenant and not a hissedar but this is not a matter of certainty.

At Pauw's settlement there was no khudkasht, no talaon and the whole village was held by sirtans. There seems to have been some development between 1859 and 1862 possibly *ad hoc*.

The entry of khudkasht at settlement seems to me in the circumstances doubtful and it is somewhat remarkable if it was a genuine entry that the khudkasht should have been abandoned and the irrigated area also between Beckett's and Pauw's settlement if it was at all genuine.

The amin has reported that all the present cultivation is an extension or series of extensions of the original map which was khudkasht. This may be thought in view of the change in area it seems somewhat remarkable.

It is impossible to be certain in a case of this kind particularly when the settlement entries are so confusing but the probability would seem to be that in 1859 the appellants' ancestor had or claimed some connexion with the village which had never been settled before that he had the village cultivated by the ancestors of the respondents but if he ever had any khudkasht he definitely abandoned it and that the village was in the possession of the respondents as cultivators for many years before Pauw's settlement possibly from 1859 or possibly from a few years after 1862.

As I said above the case is on the border line but on the probabilities I think the respondents win. It is purely a question of fact.

The appeal therefore fails and is dismissed with costs.

L. M. STUBBS,

*December* 20, 1932. *Commissioner, Kumaun Division.*

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PETITION NO. 13 OF 1932-33

*Copy of Board's order passed in the case of* RAM PARSHAD, *applicant*, versus RAGHBANAND, *respondent, mauza Margun, district Garhwal*

Application for revision of the order of the Commissioner, Kumaun Division, dated December 20, 1932, in the case of ejectment and recovery of price.

*Held* by Mr. Drake-Brockman, Senior Member, Board of Revenue, that if a tenant has held possession for a long time or for several generations at a fixed rent or rent only varied at settlement a sirtan loosely called a maurusi sirtan is and protected from summary ejectment at the suit of the land-holder.

If we admit that what is loosely called a maurusi sirtan, that is to say, a man who has held possession for a long time or for several generations at a fixed rent, or rent only varied at settlement, is a sirtan who is protected from summary ejectment at the suit of the land-holder, no point justifying a revision arises in this case. On the evidence the documentary part of which was very uncertain, in the lower and higher appellate courts found that the respondent had been in occupation at least from about 1865 and this is what he himself said in his written statement. I should myself infer from the settlement entries that previous to Mr. Beckett's settlement there had been some cultivation in the village for 465 fields are shown both in the khasra and the map, by numbers. But in naksha no. 7 while the full area is shown as 13 bisis odd they are shown as layek abadi. From the fact that Mr. Beckett assessed Rs.2 for the first 15 years and Rs.5 thereafter I would judge that he was assessing on the ground of cultivatibility and not actual cultivation if the respondent came in subsequently he brought all this land under cultivation again and extended it into new land. But with the records which are so uncertain this inference will not necessarily be any more correct than that drawn by the courts below.

The application therefore is dismissed. Parties might bear their own costs.

D. L. DRAKE-BROCKMAN,
*Senior Member.*

*September 6, 1933.*

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## CHAPTER IV—Water Rights

### IN THE COURT OF THE DEPUTY COMMISSIONER, GARHWAL

*Dated November 10, 1921*

REVENUE APPEAL NO. 3 OF 1921

Sher Singh and others of mauza Sandwalgaon Bachhansyun ... ... ... ... *Appellants,*

*versus*

Kutta of mauza Taithi, patti Bachhansyun ... ... *Respondent.*

Appeal against the order of Lala Prem Lal Sah, B.A., Assistant Collector, I class, Barahsyun, dated September 30, 1921.

*Held* by Mr. Mason, Deputy Commissoner, Garhwal, that court cannot compel any person to allow others to constuct a gul thrugh his nap fiel ls.

JUDGMENT

1. This is an appeal under rule 14 of the Kumuan Water Rules (notification no. 232/IX—165, dated January 9, 1917). Plaintiffs of Sandwalgaon sue for continuation of a gul in defendant's village Taithi, which

they allege should irrigate their field nos. 44, 45 and 47, but has been cut off by defendant. The lower court found that their request involved making a new gul through defendant's nap field no. 140, to which defendant refused to consent, and dismissed the suit with costs. Plaintiffs appeal, alleging that their gul dates from before 1883 and that it must have been overlooked at the last settlement, presumably by the *chalaki* of Taithi people.

2. I agree with the lower court that plaintiff's old settement gul having become useless owing to erosion at the point where it used to take off from the Bachangar nala they now want to continue defendant's more recent gul higher up down to their gul so as to feed it at a point above or rather below its old mouth (point marked X by me on map Exhibit AI). This involves taking a short section of the continuation through defendant's nap field no. 140 : the rest would be through Kaisar-i-Hind land of defendants' village. I do not believe plaintiff's story that in the old days of Mr. Beckett's settlement they had a gul here and if they did it was certainly not on the alignment now proposed. Legally therefore they have not a leg to stand on and their claim is false.

3. I put it to defendant that his field no. 140 is only 4½ nalis of inferior unirrigated land and that he might well allow his gul to be continued through it even if it did take up $\frac{2}{16}$ or $\frac{3}{16}$ of a nali seeing that to do so would provide plaintiffs with many nalis of good shera. He refused point blank. He said he would never abrogate or forgo a single inch of his land and would never allow men of another village to profit a pice by a gul which he had made and paid for. Let them look after themselves. In reply to a suggestion he said if his income was Rs.2,000 he would not forgo 8 annas of it even, if so would give somebody else Rs.500. His attitude reminded me of some villagers who followed me for some distance in the Ganges valley begging and praying that the new Hardwar-Karnprayag Railway which is absolutely vital to the future of this district, might not be made because its alignment passed through some of their best fields. He said his precious 4½-nali field 140 was dry land and would be ruined if the gul was taken through it though he admitted he held 200 nalis of land altogether. When I told him that if his gul was soon rendered useless by erosion as plaintiff's had been he might regard it as the justice of Providence on him for his selfishness he said he would gladly do so and that now I was talking sense which he could understand—a very interesting sidelight on the mentality of the Garhwali villager.

4. The appeal is dismissed, but in view of the unreasonably selfish attitude taken up by defendants he will get no costs in either court.

P. MASON,

*Commissioner, Garhwal.*

*December* 10, 1921.

## BOARD OF REVENUE

*Present*: MR. OPPENHEIM, *Senior Member and* MR. WALTON, *Junior Member*

APPLICATION NO. 14 OF 1931-32

*Dated October* 5, 1932

Dhan Singh and others... ... *Defendants-Applicants,*

*versus*

Bhana and others ... ... *Plaintiffs-Opposite party.*

Application for revision of the order, dated March 30, 1932, of the Commissioner, Kumaun Division, in a case of claim for a water spring.

*Held* by Messrs. Walton and Oppenheim, Members of the Board of Revenue, that the Board had powers of revision under the Nayabad Rules of 1916 but has no such power under the Water Rules of 1917 and the Nayabad Rules of 1930, and 1931.

ORDER

OPPENHEIM, *Senior Member, (October* 3, 1932).—In view of the fact that there is much uncertainty in the Kumaun Division on the question whether applications in revision lay to the Board under the superseded Nayabad Rules of 1916 and the superseded Water Rules of 1917 and whether such applications to the Board under the existing Nayabad Rules of 1931 and the existing Water Rules of 1930, I admitted these applications in order that an authoritative ruling on the subject might issue.

Under the old Kumaun Rules of 1894 which dealt *inter alia* with grants of Nayabad land (rule 49 of those rules) such an application undoubtedly lay. Rule 26 of those rules was couched in very wide terms. It ran as under :

> "The Board may call for and examine the record of any case of the proceedings of any court subordinate to it for the purpose of satisfying itself as to the legality of any order passed, and as to the regularity of the proceedings of such court."

There is no specific reference to the Water Rules in the Kumaun Rules of 1894, but the wording of rule 26 is such that it may be taken that the Board had powers of revision even in cases coming under the Water Rules.

About 1916 probably in view of the consideration that it had been decided to extend to Kumaun the jurisdiction of the High Court in civil cases, sets of new rules were enacted. These rules not only superseded the Kumaun Rules of 1894 but also made some alterations in those portions of the Land Revenue Act which had been applied to Kumaun in 1901. Those portions of the Act which had been extended had not included section 219, the section which gives the Board general powers of revision. Presumably the reason was that the Kumaun Rules of 1894

gave the Board more wide powers and that it was therefore unnecessary to include the section in question. That section was then included.

The rules, which were standardized at that time, were the Nayabad Rules of 1916, the Water Rules of 1917 and the Kumaun Tenancy Rules of 1918.

"Regulation applications for and grants of unmeasured or unassessed lands."

There were specific rules about appeals to the Deputy Commissioner and to the Commissioner. There was no reference to the Board in the rules. But there was a rule added in 1918 which said that:

> "The procedure prescribed in the Kumaun Tenancy Rules of 1918 applicable to suits and applications under those rules shall so far as may be applied to all suits and applications of the nature referred to in the preceding rule."

(The rule about suits and application about Nayabad land.) The Tenanacy Rules, to which reference was made, contained a specific provision allowing revision by the Board. This provision did not give the Board as wide powers as had been given under rule 26 of the Kumaun Rules of 1894. It restricted the powers of the Board by permitting reference to the High Court on revision under the Code of Civil Procedure. It ran as under:

> "The Board may, on the application of a party to the case or on report made or on its own motion call for the record of any case which has come before any subordinate revenue court in which the court appears to have exercised a jurisdiction not vested in it by the law or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order thereon as it thinks fit."

I interpret these two rules as having given the Board those powers of revision stated in rule 17 of the Kumaun Tenancy Rules of 1918 in cases under the Nayabad Rules as compared with the practice of the past when all revisions were accepted by the Board.

> "The provisions of the Code of Civil Procedure as in force in the Kumaun Division shall so far as they are applicable and are not inconsistent with these rules, apply to all suits and other proceedings under these rules."

The effect of the substitution of rule 15 of the old rule by this rule has been to remove from the Board the powers of revision which it had under the old rules.

The question of revision under the old obsolete Water Rules of 1917 and the current Water Rules of 1930 presents no difficulty at all. In neither set of rules is there any reference to the Board. The rules contain full provision about rights of appeal and no provision at all about rights of revision. There is nothing in these rules which indicate that it was the intention to give the Board power to interfere on revision in these

cases. Nor, so far as the local Bar present here and the Commissioner's Sarishtedar know, has there ever been any application on revision.

It is urged that in spite of the wording of the rules the Board have powers of revision by virtue of the provisions of section 5 and section 219 of the Land Revenue Act as extended to Kumaun. Section 5 says that the control of all matters connected with the land revenue is vested in the Board. Section 219 says that the Board may call for the record of any case of a judicial nature if the officer by whom the case was decided appears to have exercised a jurisdiction not vested in him by law, or to have failed to exercise a jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the cases as it thinks fit.

As regards section 5 it would be far fetched to hold that the matters covered by the Nayabad Rules and the Water Rules are matters "connected with the land revenue" within the meaning of that section. If it had been the intention of the law that powers in the cases specified above, that intention would have been specifically stated in the rules.

The ordinary construction of the two sections cited above would be to give the Board power of revision in cases under the Land Revenue Act as extended to Kumaun and to give the Board general power of control in all matters connected with the land revenue in the Kumaun Division but not to give the Board power of interference in cases under these rules which made no mention of such power.

For these reasons I would hold that the Board had powers of revision under the Nayabad Rules of 1916 and that they had no such power under the Water Rules of 1917 and that they have no such power under the Nayabad Rules of 1921 and under the Water Rules of 1930. I would therefore dismiss these applications and would let parties to these proceedings bear their own costs.

MR. WALTON, *Junior Member* (*October* 5, 1932)—I agree.

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## IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated April* 19, 1934

MISCELLANEOUS REVENUE APPEAL NO. 56 OF 1933-34

*Instituted on January* 13, 1934

Bhawan Singh and others of village Kothagi Dasjula, Garhwal ... ... ... ... *Appellants-Plaintiffs,*

*versus*

Bhudramani and others of Kuili Dasjula, Garhwal ... *Respondents-Defendants.*

Appeal against the order of W. F. G. BROWNE, ESQ., I.C.S., Deputy Commissioner, Garhwal, dated November 16, 1933, regarding declaration

of right for stopping the gul which defendants are constructing under Kumaun Water Rules.

*Held* by Mr. Owen, Deputy Commissioner n charge, Kumaun Division, that suit for stopping the respondent from constructing and using a channel which they claimed was for drinking purposes only is essentially one under the Kumaun Water Right Rules and that the civil court has no jurisdiction in the matter.

ORDER

This is an appeal from an order of the Deputy Commissioner, Garhwal. A suit was filed in the Court of the Sub-Divisional Officer, Chamoli, purporting to be under section 39 of the Specific Relief Act with the object of stopping the respondents from constructing and using a channel which they claimed was for drinking purposes only.

The Sub-Divisional Officer decreed the suit but the lower appellate court on appeal held that this was purely a civil suit and that a revenue court had no jurisdiction. I think the lower appellate court was wrong. It is true that the plaint was badly drawn up and that mention was wrongly made of the Specific Relief Act. It is also true that the plaintiffs were made to claim rights over the whole gadhera but this is a case which is obviously provided for by the Kumaun Water Rules and the fact that the lawyer who drafted the plaint was not very expert is no reason why the clients should be penalised. Rule 2 lays down that all disputes arising out of irrigation channels shall be tried exclusively by the revenue courts.

It is argued that this is not an irrigation channel but drinking channel and that the rules do not therefore apply. I am not prepared to accept this argument. Once a channel has been made it is available either for watering the fields or for drinking purposes and if this kind of argument is once accepted every channel illegaly made will be declared for drinking purposes only so as to remain outside the rules.

I would therefore hold that this suit is essentially one under the Kumaun Water Rules and that the civil court has no jurisdiction in the matter. The suit was therefore correctly heard by the court of first instance.

I now come to the dispute proper, which is concerning the new gul made by the Kuili people. The claim that this water is required for drinking purposes only is disposed of by their admission that there are three wells and two water-pits in their village. The argument that these have all been rendered useless by an earthquake does not appeal to me. In any case it is clear that water is available at a reasonable level below the soil in their village and they cannot construct a gul without permission that interferes with the established water rights of another village. Rule 1 lays down that such a channel must not reduce or otherwise injuriously affect an existing right of user of water belonging to any other party. There is evidence to show that the water is insufficient for the appellants and that the respondents have already been twice prohibited from constructing this gul.

I hold that the construction of his gul will injuriously affect the right of user of water belonging to the appellants. I therefore allow the appeal and order the demolition of the gul under rule 5 and prohibit any future construction of a gul by the respondents.

L. OWEN,

*Deputy Commissioner, in charge*
*Kumaun Division.*

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IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER, IN CHARGE, KUMAUN DIVISION

*Dated July* 18, 1934

MISCELLANEOUS REVENUE APPEAL NO. 86 OF 1933

*Instituted on March* 13, 1934

Diwan Singh and others of Bamora, patti Talla Silor, Almora ... ... ... ... *Appellants-Defendants,*

*versus*

Dhani Ram and others of Pipalkot Talla Silor, district Almora ... ... ... ... *Respondents-Plaintiffs.*

Appeal against the decree and order of J. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated February 13, 1934, regarding claim to obtain right of user over water situated on waste land under Nayabad Rules.

*Held* by Mr. Owen, Deputy Commissioner in charge, Kumaun Division, that a suit for a right to a spring which is without a channel for irrigation or drinking purposes lies under the Nayabad Rules and not under the Water Rules.

ORDER

In this suit the villagers of Pipalkot pleaded that they were entitled to take drinking water from certain springs situated in benap land near their boundary but actually in Bangora village the court of first instance held that although they had for some years been getting their water from these springs it required a period of 60 years to establish an easement in Crown property and benap land which in Kumaun is admittedly Crown property. Proof that they had enjoyed this land for 60 years not being forthcoming the suit was dismissed.

In appeal the Deputy Commissioner held that the 60-year rule only applied to suits against the Crown and therefore did not apply in this case. He therefore allowed the appeal.

It is against this order that an appeal has been filed in this court.

The first point raised is that the Secretary of State has not been made a party to the suit. It was not necessary to make him a party nor is he ever made a party in applications or suits under the Nayabad Rules when the Government is not directly interested. In this case the Secretary of State's rights are not in question either way so that he was not a necessary party. The court was perfectly justified in applying section 9, Civil Procedure Code, and proceeding with the suit.

Another point raised was the question of whether this suit properly comes under rule 36 of the Nayabad Rules or not. In my opinion there is no doubt at all about this. Any right claimed in benap land is triable in the Revenue and not in the civil courts. My attention has been drawn to an order of my own in which I held that the Water Rules applied to channels built for drinking water as well as irrigation channels. I distinguish between a channel which can be used for either purpose and a spring which without a channel can obviously not be used for irrigation. These proceedings have therefore been rightly dealt with under the Nayabad and Waste Land Rules.

Another argument is based on the Madras ruling (92 I. C., 465 Madras) to the effect that a fluctuating population such as a village community cannot acquire easementary rights. I am unable to follow this ruling which would destroy the foundations on which the case law of Kumaun has been built. The village community in Kumaun is in fact a corporation and it is a fundamental principle of law that a corporation is a person. Changes in the body corporate do not affect the entity of the person nor do they affect the ability of the corporation to acquire rights by the lapse of time.

Was the lower appellate court right then in holding that easementary rights had been acquired by the Pipalkot villagers. The evidence of the patwari and two aged men of the locality shows that for over 30 years these rights of drawing water had been exercised without question. The evidence of the old men has been impugned on very flimsy grounds but I agree with the lower appellate court that it is worthy of respect. The period of 60 years applies to Government property only. It would apply in the case of Bangora village itself if Government were to bring a suit against it for constructing the naula but it does not apply in the case of rights that are in dispute between two villages. In such a case the period involved is 20 years only, and the lower appellate court was therefore right in holding that easementary rights had been acquired.

The question of the change of the sites of the springs has not been argued in this court.

The appeal is dismissed with costs.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

## IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated December* 3, 1934

MISCELLANEOUS REVENUE APPEAL NO. 147 OF 1933-34

*Instituted on July* 10, 1934

Charan, son of Tula, village Singori, patti Katulsyun, Garhwal ... ... ... ... *Appellant-Applicant,*

*versus*

Guman Singh, son of Kutal Singh, village Singori, patti Katulsyun, Garhwal ... ... .. *Respondent-Objector.*

Appeal against the order of Captain R. H. G. Johnston, I.C.S., Deputy Commissioner, Garhwal, dated May 6, 1934, regarding cancellation of the sanctioning order of Gharat under Kumaun Water Rules.

*Held* by Mr Owen, Deputy Commissioner in charge, Kumaun Division, that whenever an application for review is taken up notice must be given to other parties. *Held* further that the Deputy Commissioner of the district is not entitled to review his own order.

ORDER

This is an appeal from an order of the Deputy Commissioner, Garhwal, sanctioning the opening of a water mill by one Guman Singh in village Singori.

A similar application had been rejected by the Deputy Commissioner's predecessor in office on January 27, 1934, and the order now appealed against was passed in review on May 6, 1934.

The argument which has been pressed before me is that under the Kumaun Water Rules the Deputy Commissioner has no power to review his order. A reference has been made to the Allahabad High Court's finding (A. I. R., 1932, All., 293) that a revenue court has no power to review its judgments because the power to do so is not expressly conferred on it by the United Provinces Land Revenue Act. It has also been argued that under the Civil Procedure Code Order XLII, rule 4, notice should have been given to the opposite-party. For the respondent it is argued that these rules are merely intended for guidance and that an executive order passed on a patwari's report without hearing or even summoning the parties is not to be treated in the same way as a judicial proceeding.

I have just read through the rules pertaining to water mills and these lay down a very precise form of procedure. Where the Deputy Commissioner has refused necessary permission an appeal lies to the Commissioner if filed within 60 days. I have pointed out that the original order was passed on January 27. The application for review was filed on

April 10, i.e. after the period allowed for appeal had elapsed. Apart from that, however, I am of opinion that whenever an application for review is taken up notice must be given to the other parties. This was not done in this case.

I hold therefore that the procedure laid down in the Kumaun Water Rules, 1930, is so precise that no departure from it is possible and that the Deputy Commissioner is not entitled to review his own order.

The appeal is, therefore, allowed and the order appealed against is set aside. Parties will bear their own costs.

L. OWEN,

*Deputy Commissioner Incharge,*
*Kumaun Division.*

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## CHAPTER VII—Malguzars

IN THE COURT OF P. WYNDHAM, ESQ., C.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated July 20, 1923*

MISCELLANEOUS REVENUE APPEAL NO. 90 OF 1922-23

Ram Sarup, son of Amar Deb of mauza Sioli, patti Gurarsyun ... ... ... ... *Appellant-Objector,*

*versus*

Deb Ram of the same place ... ... ... *Respondent.*

Appeal against the order and decree of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 21, 1922.

*Claim*—Malguzarship.

*Held* by Mr. Wyndham, Commissioner, that the son of a dismissed malguzar may conceivably be a suitable candidate for the office; but that each case should be decided on its own merits.

ORDER

Heard appellant in person.

The malguzarship of Sioli is vacant—the last incumbent was dismissed for refusing to carry out his duty. There are two candidates—the son and Debi Ram. Debi Ram has been selected. I am quite willing to admit that the son of an imprisoned malguzar may conceivably be a suitable candidate, but each case is to be decided on its merits. The Deputy Commissioner had good grounds for refusing to take the appellant.

The appeal is dismissed.

P. WYNDHAM,

*Commissioner, Kumaun Division.*

## IN THE COURT OF P. WYNDHAM, ESQ., C.B.E, C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION.

*Dated December 4, 1923.*

MISCELLANEOUS REVENUE APPEAL NO. 31 OF 1922-23.

Gyan Singh Negi of Kolasu, patti Bangarhsyun, district Garhwal ... ... ... ... *Appellant. Applicant.*

*versus*

Lal Singh of the same place ... ... ... *Respondent. Objector.*

Appeal against the order of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated July 2, 1923.

*Claim*—Malguzarship.

*Held* by Mr. Wyndham, Commissioner, that when there is nothing prejudicial against the nearest of kin voting cannot have preference in selecting a malguzar.

ORDER

This is a padhanchari case.

Along with the appointment there are certain padhanchari lands less than an acre but much treasured all the same.

It is usual in such cases where land is attached to the appointment to try to keep it in the family. In this case the Padhan Jit Singh has no issue, he has thrown up his post of Padhan and has disposed of his lands to others, the appellant Gyan Singh his nearest heir has a pre-emption suit in the courts against him. Ordinarily Gyan Singh as nearest of kin ought to be selected as padhan.

The hissedars have been asked their opinion and the majority of votes are in favour of one Lal Singh, a resident of the village and a Public Works Department Jamadar, and so a man of some influence in getting votes.

The Deputy Commissioner has been bound by these votes and taken Lal Singh.

The fact that Lal Singh has been in prison in a petty riot case is neither here nor there. The former malguzar Jit Singh also went to jail in the same case.

I cannot get over my prejudice or inclination to maintain the malguzarship in the family if possible and especially so when this post carries land with it which the padhan has looked on as family land probably improved.

I do not think we ought to be guided solely by votes where an influential local official is one of the party. Voting is often no criterion and I am not inclined to set aside ancestral claims especially as the appellant Gyan Singh has nothing against him equally with Lal Singh.

I set aside the appointment of Lal Singh and direct that Gyan Singh, the nearest of kin to the outgoing malguzar, be appointed. Costs on parties.

P. WYNDHAM,

*December* 4, 1923. *Commissioner, Kumaun Division.*

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IN THE COURT OF N. C. STIFFE, Esq., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated August* 14, 1925

MISCELLANEOUS REVENUE APPEAL NO. 19 OF 1924-25

Lalita Prasad, son of Beni Ram, malguzar of Khola, patti Katulsyun, district Garhwal ... ... *Appellant,*

*versus*

Gauri Shankar, son of Beni Ram, malguzar of Khola, patti Katulsyun, district Garhwal ... ... *Respondent.*

Appeal against the order of T. J. C. Acton, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 11, 1924.

*Claim*—Malguzarship.

*Held* by Mr. Stiffe, that the son of a dismissed malguzar could *not* be appointed in his place.

ORDER

I will not appoint the son of a dismissed malguzar. I agree with the Deputy Commissioner and reject the appeal.

N. C. STIFFE,

*August* 14, 1925. *Commissioner, Kumaun Division.*

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IN THE COURF OF L. M. STUBBS, Esq., C.S.I. C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated October* 21, 1932

MISCELLANEOUS REVENUE APPEAL NO. 37 OF 1931-32

*Instituted on February* 1, 1932

Jai Krishan of mauza Kandeli, patti Rawatsyun, district Garhwal ... ... ... ... *Appellant,*

*versus*

Hari Ram of the same place ... ... ... *Respondent.*

Appeal against the order of W. F. G. Browne, Esq., I.C.S., Deputy Commissioner, Garhwal, dated December 14, 1931.

*Claim*—Malguzari under Kumaun Rules.

*Held* by Mr. Stubbs, Commissioner, Kumaun Division, that nearest relation should be appointed malguzar when there is no obvious disqualification.

ORDER

There can be no question about this. The *halat gaon* is quite clear. The nearest relation is to be appointed if he is fit. And the uncle of the last malguzar is much nearer than the cousin, beside, being in the same branch of the family as the three previous malguzars.

There was therefore no occasion for any voting or any question of comparison there being obvious disqualification.

Dismissed with costs.

L. M. STUBBS,
*Commissioner, Kumaun Division.*

*October* 21, 1932.

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IN THE COURT OF L. OWEN, ESQ., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION.

*Dated November* 13, 1933.

MISCELLANEOUS REVENUE APPEAL NO. 10 OF 1933-34.

*Instituted on November* 8, 1933.

Saroop Singh Maneral, son of Kesar Singh, of village Chachroti, Tall Chowkote, Almora ... *Appellant-Applicant,*

*versus*

Lachham Singh of the same place ... ... *Respondent-Objector.*

Appeal against the order of L. F. Sale, Esq., I.C.S., Deputy Commissioner, Almora, dated October 11, 1933.

*Claim*—Malguzarship under Kumaun Rules.

*Held* by Mr. Owen, Deputy Commissioner, Kumaun Division, that the khaikars' votes are not counted in the appointment of a malguzar as khaikars have no status entitling them to vote.

ORDER

This is an appeal against the order of the Deputy Commissioner, Almora, dated October 11, 1933, appointing Lacham Singh, respondent, as malguzar.

The facts briefly are that there were in this village originally two *dharas* each with its own malguzar. The ancestor of Daulat Singh was malguzar of one and Daulat Singh who is not a party to this case is still malguzar of that *dhara*. The second *dhara* was split into two in 1872 and the ancestor of Lachham Singh, respondent, became malguzar of one part while the malguzarship of the second part which had been alienated was granted to the purchaser.

Umrao Singh was the last direct representative of this purchaser and was malguzar. He died without heirs having previously made over his share by deed of gifts to Sarup Singh, the appellant and another. Sarup Singh claims to be made malguzar. In the first place it is clear that Sarup Singh has no right to this appointment. A malguzarship is generally regarded as hereditary and custom has practically made it so but it is not an essential ingredient of the proprietorship of a share. Thus Stowell characterizes the claim of a purchaser as absurd and the position of a donee is much the same as that of a purchaser. He has a right to apply with other hissedars for the post and he may, if he is the most suitable person, be appointed. But in case of a dispute the proper procedure is by election. This was followed in this case and 23 hissedars voted for Lachham Singh, respondent, as gainst 14 for the appellant. For some reason unknown the votes of the khaikars were also taken and a majority of the khaikars voted for the appellant. I can find no authority for accepting the votes of the khaikars. Stowell does not say that they have any right to vote. In such cases I think it is best to follow old custom and rely on the votes of the hissedars only. (I note in passing that Lachham Singh had a clear majority even including the khaikar votes.) There is therefore no doubt that Lachham Singh was duly elected by the vote of his peers. The naib-tahsildar's report shows also that he is the most suitable person. He is further the direct descendant of the original malguzar of this *dhara*. I therefore consider that he has been rightly appointed and the present appeal is therefore summarily dismissed.

L. OWEN,

*Deputy Commissioner in charge,*
*Kumaun Division.*

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## CHAPTER VIII—Mutations

IN THE COURT OF P. WYNDHAM, ESQ., C.B.E., C.I.E., I.C.S., JUDGE, KUMAUN HIGH COURT

*Dated December* 21, 1922

SPECIAL CIVIL APPEAL NO. 27 OF 1922

Mst. Ram Sundari, widow of Pandit Ram Krishan Tewari of mauza Jhalori, Palla Atthaguli, district Almora ... ... *Appellant-Plaintiff,*

*versus*

Gopal Datt, Purna Nand and others of mauza Jhalori, patti Palla Athaguli, district Almora ... ... ... *Respondents-Defendants.*

Appeal against the order of F. C. M. Cruickshank, ESQ., I.C.S., Deputy Commissioner, Almora, dated August 8, 1922.

Claim for declaration of right in and to get possession of 254 6/16 nalis Rs.12-11 6 revenue-paying land in mauza Guloli, patti Malla Silor.

*Held* by Mr. Wyndham, Commissioner, that an objection regarding proprietory title during partition proceedings by a person not recorded in the revenue papers under rule 57(4), Kumaun Rules, is maintainable as rule 57(4) is a substitute for section 111, Land Revenue Act, and that where rule 57(4) is in conflict with section 34(5), Land Revenue Act, it is entitled to equal weight. The court has inherent powers under section 151, C. P. C., too in this matter.

ORDER

This suit relates to the village of Guloli.

It is admitted by the parties before me in this appeal that defendants nos. 1 and 2 applied under Kumaun Rules for a partition and that this appellant Mst. Ram Sundari raised an objection in these proceedings under section 54(4) of Kumaun Partition Rules.

This objector filed her application stamped as a civil suit under this section—she is not recorded in the registers and sued for a declaration of title and possession over 254 odd nalis as her sahre as widow of her husband—one of three brothers.

The Sub-Divisional Officer tried this objection on the revenue side with the formalities of a civil suit under section 57(4) and granted a decree.

On appeal to the learned Deputy Commissioner it was urged that clause (5) of section 34 of the Land Revenue Act, III of 1901, as applied by notification no. 134/T—624 of January 19, 1918, to Kumaun Hills bars this suit by the widow as she admittedly is not a recorded hissedar in the registers prescribed by section 33.

This fact is admitted that this widow has not taken out mutation. Section 34(5) Land Revenue Act runs:

"No revenue court shall entertain a suit or application by the person . . . until such person has made the report required by this section."

Section 57(4) of Kumaun Rules (Partition) runs:

"He shall consider any objection to the application and examine any person interested and present in court. If any objector raises any question of title or proprietory right he shall require the objector to pay the fees chargeable. . . ."

NOTE—Section 57(4) of the Kumaun Rules takes the place of section 111 of the Land Revenue Act which is not applicable to Kumaun.

It may be noted that section 57(4) of the Kumaun Rules differs widely from section 111 of Land Revenue Act:

(1) It does not confine objections to recorded co-sharers only as section 111 does but probably recognizing the very incomplete state of the Kumaun Revenue records. It empowers a partition officer to examine any person and here any objection and then if a question of title is raised it gives him no option as in section 111 but compels him to try the question of title as a civil suit.

Section 57(4) of the Kumaun Rules is our local substitute for section 111 of the 1901 Revenue Act and where it conflicts with section 34(5) of the Act it is entitled to as much weight as if it were a section of the Act itself.

It would be disastrous to Kumaun if we permitted section 34(5) of the Land Revenue Act to be applied to objections in partition proceedings, for an outcry for revision of records could not be stayed.

We have two sections to choose from they may be conflicting or not. It might be urged that section 34(5) applies to suits and applications only and does not apply to objection, but I prefer to Act under section 151 of the Civil Procedure Code and to direct that section 34(5), Land Revenue Act, should not overrule section 57(4) of the Kumaun Rules.

The finding of the learned Deputy Commissioner on this preliminary point is accordingly set aside and the appeal is returned to his court for decision on its merits. I make no orders as to costs.

P. WYNDHAM,

*December* 21, 1922. *Judge, Kumaun High Court.*

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PETITION NO. 16 OF 1931-32

*Copy of Board's orders passed in the case of* FATE SINGH, *applicant,* versus BALBHADRA SINGH BARTWAL, *respondent, mauza Malkoti, patti Talla Nagpur, district Garhwal*

Application for revision of the order of the Commissioner of Kumaun Division, dated March 18, 1932, in the case of mutation.

*Held* by Mr. Drake-Brockman, Senior Member, Board of Revenue, that mere title is not sufficient for mutation of names, but possession must be proved.

ORDER

This is a petition in revision, apparently under section 219 of the Land Revenue Act as applied to Kumaun.

All the facts have not been clearly brought out in any of the orders passed by the lower courts.

The respondent, Balbhadra Singh, is the son of one Ratan Singh by the senior and apparently proper wife.

The appellants are in two cases the sons and in the third case the grandson of the same Ratan Singh by the junior wife and apparently one not married in the true form.

Property in seven villages is concerned in the appeals before us: namely Malkoti, Kandhar, Tolab, Bhandheri, Bamoli, Swarigwans and Tamen.

The three brothers by the second wife sued Balbhadra Singh in the civil court for a declaration to the effect that they were entitled to a three-fourth share in the whole property left by their father.

The suit was originally summarily dismissed by the Assistant Collector under the proviso to section 42 of the Specific Relief Act on the ground that the plaintiffs should have sued for possession of so much of the property in addition to a declaration.

This order was upheld by the Deputy Commissioner but set aside by the Commissioner who remanded the case for trial on merits—it was accordingly so tried.

The suit was now decreed by the Assistant Collector and his order was upheld both in first and second appeals, the last order, that of the Commissioner, being dated December 6, 1927.

On the strength of this decree, Fateh Singh, the eldest of three appellants, has filed reports in the standard form for mutation of name in the phant. All these reports are dated August 12, 1930. Apparently the report is made under rule 2(*a*) of the rules for regulating proprietory mutations in the Kumaun division, dated May 31, 1919, and purport to be under section 33 of the Act (III) of 1901.

Nowhere in the existing files is there any evidence as to what the existing entries are. But the respondent has produced copies of the "phant" which shew as follows :

> In Malkoti, Kandhar, Tolab, Bandheri and Bamoli, the applicants and Balbadra Singh are recorded as hissedars to the extent of a half share each.

In Swarigwans and Tamen, only the name of the respondent is recorded. These two appear to be mainly if not wholly khaikari-held villages

It would thus appear that applicants are already in possession of one-half of the property in the first five villages, whatever may be the case with the other two. They say they get a share of the profits of them ; respondent denies this. The tahsildar's report which speaks vaguely of the possession over one-half is not entirely correct.

The Assistant Collector refused mutation over three-fourths of the property on the ground that applicant could not prove possession of so much. The Deputy Commissioner found that the whole property was the joint property of the parties, that there has been no partition between them (though there had been a family arrangement by which they enjoyed separate parts of the property as held by the civil courts in the litigation relating to the declaration, and that there was no question of "obtaining possession" and that therefore, they were entitled to have their names entered). The learned Commissioner held that joint possession was of no value—separate possession was required and set aside the order, dismissing the "suit for mutation"

The reasoning of the Deputy Commissioner seems to be fallacious. The applicant has elected to come to the revenue courts and the latter

are bound to decide the dispute that has arisen on the basis of "possession." The possession over three-fourths of the property may be constructive or actual. It is obviously not actual because whatever the merits of the family arrangement may be, it is clear that the applicants are only in possession of one-half in five villages and probably I might say almost certainly not at all of the remaining two. It is not constructive because formal possession has not been handed over by the civil court. The applicants' declaratory decree is in fact incapable of execution, though execution appears to be narrowly within limitation.

Having got his name recorded in the papers over three-fourths applicant intends then apparently to apply for partition. In other words what he is practically doing is to trying to execute his decree through the medium of mutation proceedings.

I have been unable to obtain a copy of the decision quoted by the Deputy Commissioner (14 R. D., page 345), but I should judge from the ruling as quoted by him that the board refused mutation in a case in which a person had obtained a declaratory decree but did not obtain possession from the civil court; he may or may not have had a decree for possession or if he had failed to execute it. In U. D. XI-58 a case is quoted in which the Board refused mutation to a person who had a declaratory decree from the civil court when the decree-holder had failed to obtain formal delivery of possession from the Civil court and failed to prove that the decree was executed. The decree-holder seems to have been not entered in the khewat at all; but this does not affect the argument. Moreover, he seems to have allowed the application to go by defaultu The point is that he evidently recognized that a declaratory decree by itself was of no value and the Board refused mutation because formal possession over the share to which title had been declared had not been obtsained. The only point in which that case differs from the present one is in that the decree-holder had no possession of any portion of the property. But I do not think this affects the principle, which is that unless the holder of a declaratory decree obtains possession of the property of which he has not got possession, the Revenue courts will not record his name over such property.

A question arises why did the applicant not combine suit for possession or for partition of the property with his suit for declaration? His legal advisers must have known that something like this was necessary. I gather from a certain paper on the file that the real reason was that he wished to avoid the very heavy stamp duties involved. The latter would no doubt be heavy and it is unfortunate; but he cannot get by roundabout means what he ought to get by straight ones. The only result is that he will have to file a suit either for possession or for partition now in the civil court before effect can be given to his declaratory decree. It may be argued that when he gets such a decree, the civil court will have to direct him to get the partition carried out by the Collector under section 54, Civil, Procedure Code read with order XX, rule 18, and the ultimate result will be the same. But the fact remains that only recorded co-sharers

can apply for partition, and the revenue courts will not record his name over three-fourths of the property until he obtains actual or formal possession of so much area.

The result is no doubt regrettable from his point of view, but the order of the Commissioner is correct and no case arises for revision. The application is accordingly dismissed. As respondent has shown throughout an intransigent spirit, I let the parties bear their own costs.

D. L. DRAKE-BROCKMAN,

*September* 6, 1933. *Senior Member.*

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PETITION NO. 32 OF 1933-34

*Copy of Board's order passed in the case of* THAKUR UMRAO SINGH, *applicant*, versus THAKUR ALAM SINGH, *respondent*, *mauza Jalai*, *patti Talla Kaliphat*, *district Garhwal*

Application for revision of the order of the Commissioner, Kumaun Division, dated April 21, 1934, in a case of mutation of names.

*Held* by Mr. Drake-Brockman, Senior Member, that a purchaser at an auction sale in execution of a decree cannot apply for mutation of names unless he obtained formal possession (*dakhal*) through courts.

This is an application in revision under Act III of 1901 as applied to Kumaun. The applicants purchased the proprietory rights of the respondent at auction. His proprietory rights consisted of some khudkasht land, some padhanchari land and some land held by khaikars in their peculiar tenure, the last predominating. The certificate of sale in favour of the applicants was dated March 19, 1932. On April 9, 1932, we find the judgment-debtor objecting to the court that the applicants were attempting to take forcible possession of his khudkasht land. On May 23, 1932, the applicants made a formal report claming mutation.

The only persons entitled to make this report are persons who have obtained possession through succession or transfer. So far as the khaikari land went they were in cultivating possession liable to pay as rent a sum equal to the revenue plus and addition by way of malikana. This would be ordinarily payable to the hissedar, even though as frequently is the case, the khaikars deposited the land revenue portion in the tahsil and paid the malikana portion to the hissedar. It is clear that they might obtain proprietory possession of this land by paying land revenue direct to Government and by ceasing to pay malikana to the hissedar, but in respect of the khudkasht and padhanchari land they would obviously have to oust the possession of the hissedar.

As I have shown the applicants obviously were not in possession on April 9, 1932, they were trying to get possession. There was no evidence that they had succeeded in obtaining possession between April 9, 1932

and May 22, 1932 when they filed their report claiming mutation in the kharif kist of 1340, i.e. the end of 1932, the respondent paid the land revenue. Reference is made to some decrees but these decrees do not appear to be relevant.

It is obvious what the applicant should have done under order XXI, rule 95 they should have applied to the court which gave the certificate for formal delivery of possession and under rule 96 the same should presumably have been done with regard to the khaikari land.

The court of first instance rejected their claim for mutation on the ground that they had not obtained formal possession. The Deputy Commissioner in first appeal found that possession was disputed and thought that the applicants came under section 40(2). The learned Commissioner set aside this order and restored the order of the Assistant Collector. Technically the learned Commissioner's order is correct. It is argued that there was no necessity for the auction purchasers to proceed under rules 95 and 96, Order XXI when they were in possession. I have shown that in respect of khudkasht land they were certainly not in possession. In respect of the khaikari land they were in cultivating possession, but at the same time so long as the respondents' name was recorded as proprietor it was open to him to claim whatever was payable by them as rent payable to himself and for the first half of 1340 Fasli he seems to have insisted on paying the land revenue to Government.

The applicants therefore not being in possession arising out of a transfer were not entitled to make the claim they made for mutation. It was not sufficient for the Deputy Commissioner to simply note that possession was disputed he has to be "unable to satisfy himself as to which party is in possession." He seems to have made no attempt to come to any conclusion. He was not justified therefore to simply say that the applicants were best entitled to the property and to put them in possession.

I hold therefore that the learned Commissioner was right in holding that until formal possession was obtained from the court which granted the sale certificate and applicants thus came into constructive possession, mutation could not be effected in their favour.

The learned Commissioner noted that the present respondent was making use of a technical defect to keep the purchasers out of the land and refused to allow him costs. Why the applicants failed immediately on opposition being taken to their possession to apply to the court for formal position does not transpire. It appears from learned Counsel on their behalf that since the learned Commissioner passed his order they have applied to the court which granted the sale certificate and that formal possession has been delivered to them. But it is not possible in dealing with his application in revision to take cognizance of their action. They must now formally apply for mutation again, making it clear that they have obtained constructive possession through the court, and proceedings to mutate their names will again be taken. While dismissing the application I agree with the learned Commissioner that the proceedings of the respondent have not been such as to justify awarding costs.

Parties will, therefore, pay their own costs.

*May* 13, 1935. D. L. DRAKE-BROCKMAN,
*Senior Member.*

## CHAPTER IX—Miscellaneous

IN THE COURT OF L. OWEN, Esq., I.C.S., DEPUTY COMMISSIONER IN CHARGE, KUMAUN DIVISION

*Dated December* 8, 1934

MISCELLANEOUS REVENUE APPEAL NO. 151 OF 1933-34

*Instituted on July* 20, 1934

Ramsaran Das, son of Mukandi Lal of Kotdwara, Garhwal ... ... ... *Appellant-Applicant,*

*versus*

Gajai Singh of village Jaintpur, Kham Bhabar, Kotdwar, the relative of Kunwar Singh and others, minors, of Har Singhpur, Sukhrhau, Kotdwar Bhabar, Garhwal ... ... ... *Respondent-Objector.*

Appeal against to the order of the Deputy Commissioner, Garhwal, dated the 1st May, 1934.

Claim for mutation under Garhwal Bhabar Kham Rules.

*Held* by Mr. Owen, Commissioner, that ordinarily sale of land by tenants in Kotdwara Bhabar Estate, is not legal, but there seems no objection to such land being sold to genuine cultivators, though transfer to capitalists who have no intention to cultivate is forbidden.

ORDER

In order to understand this appeal it should be premised that Lachcham Singh was a tenant in the Garwal Bhabar Government estate, Mst. Manti was his wife, while Kunwar Singh and others were his minor children. Ram Saran Dass Maheshri, a money-lender, lent him Rs.1,400 when he was in difficulties and Lachcham Singh mortgaged his land to him. Subsequently Lacham Singh died and his widow Mst Manti in consideration of the further sum of Rs.450 sold the land outright. The money-lender then applied for mutation which was refused by the Deputy Commissioner, Garhwal, on the grounds (1) that the property did not belong to Mst. Manti and (2) that she could not transfer property belonging to her minor sons until she had been properly constituted their guardian.

Against this order Ram Saran Dass has appealed.

The first and most obvious point about this case is that under section 23 of the Agra Tenancy Act no occupancy tenant has a right to transfer his interest to a third party. That this purported to be a sale of more than ordinary tenancy rights is clear from the price paid. Rupees 1,850

for 18 bighas. The Deputy Commissioner was therefore right in refusing to grant mutation. This appeal therefore fails and is dismissed with costs.

Before concluding however I deem it advisable to add a brief note on the so-called selling of malwa. The Garhwal-Bhabar is a backward tract and it therefore happens that tenants have had, either themselves or through their ancestors, to incur considerable expense in bringing the land under cultivation—houses have had to be built and jungle cleared and it has been customary for the outgoing tenant to recover the cost of his improvements from the incoming tenant at a valuation mutually agreed upon. This is called the selling of malwa.

I can see no objection to the continuation of this system provided the sale is made to a genuine cultivator. There is however a marked difference between this and the transfer of land to a capitalist who has no intention of cultivating the land himself. The latter individual, in order to recover interest on his capital, has to charge a higher rate of interest or rent to Government which is the landlord. Also the actual cultivator loses the right of continuity which Government has conferred upon him. Transfer of land to capitalists under the guise of selling malwa is therefore to be discountenanced.

L. OWEN,

*Deputy Commissionor in charge,*
*Kumaun Division.*

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PETITION NO. 17 OF 1934-35

*Copy of Board's order passed in the case of* RAM SARAN DAS, *appellant*, versus GAJAI SINGH, *respondent*, *mauza Hur Singhpur Kotwar, district Garhwal*

Second appeal from the order of the Commissioner, Kumaun Division, dated December 1, 1934.

*Held* by the Board of Revenue, that a tenant in Kotdwara Bhabar Estate can transfer his grove land and material of the house.

It has been judicially held by me that this means that they have all the privileges of an occupancy tenant and subject to all the liabilities of the same.

One Lachaman Singh was a tenant in the Garhwal Bhabar Estates—Act III of 1926 does not extend to this area.

Tenants used to be admitted to occupation of land in these estates on leases but recently Government by executive order conferred on them all the privileges of an occupancy tenant.

In part of his holding Lachaman Singh created a bagh of fruit trees which is a valuable property. He seems to have borrowed money on the security of it from a money-lender and after his death his widow sold the

bagh outright in satisfaction of the mortgage debt plus a small sum drawn on her own behalf and that of her two sons.

The money-lender now asks for his name to be recorded in the papers against the plot in suit, but he does not say in what particular register. The Deputy Commissioner refused to record his name in the village registers on the ground that an occupancy tenant cannot transfer his interest and the learned Deputy Commissioner in charge, Kumaun Division, has recorded certain remarks regarding the customs of an outgoing tenant selling what is called his malwa to an incoming tenant which do not appear to me to be relevant.

It is customary in the Garhwal Bhabar for an outgoing tenant to sell the materials of his house to an incoming tenant but it has always been apparently recognized in the Bhabar that he has a right to sell the materials of his house or in the alternative of course to remove them. In any case admission to tenancy depends on the Government. No question of the transfer of the land itself seems to be involved, although it is possible that something not unlike a transfer of rights in land takes place. In this case a tenant has created a valuable property in the shape of a grove on a part of his holding. Had Act III of 1926 been applicable to the area, the tenant would at the present time be a grove-holder of this plot and grove-holders are entitled to transfer their interest in a grove.

As the ejectment of a grove-holder who pays his rent is unthinkable so long as the grove lasts, it does not seem to matter much whether the tenant who creates the valuable property or his transferee is in possession. If a tenant who creates a valuable property of this description cannot in time of need raise money on it his private actions would appear to be needlessly restricted.

That legal possession has been handed over to the applicant does not appear to be contested.

The legal position of tenants in the Garhwal Bhabar is no doubt anomalous, but it would appear to have been the intention of Government to put them on the same footing as occupancy tenants under Act III of 1926. One of the ways in which Act III of 1926 operated was to make all tenants who had created groves under the conditions enumerated in section 196 of the Act, grove-holders of such portions of their holdings as were grove land ; and I would hold that the provisions of chapter XII of the Agra Tenancy Act would apply to the tenants in the Garhwal Bhabar as soon as they were given the status of occupancy tenants in the same manner as to occupancy tenants generally in the rest of the province of Agra. I would hold, therefore, that the tenant was entitled to transfer the grove and the purchaser entitled to purchase it and to have his name recorded in the registers as in occupation of the land as a groveholder.

I do not see that it is necessary for the revenue courts to discuss the question whether Musammat Manti was or was not capable on behalf of her minor sons to sell the grove when this objection was not raised by any [illegible] on their behalf. They will have their remedy to set aside the sale [illegible] when they come of age.

I would therefore allow the appeal, set aside the order of the learned Deputy Commissioner in charge, Kumaun, and direct that Ram Saran Das be recorded as grove-holder of the land in suit at the rent payable by the late tenant.

At any rate I am unable to see how we can escape from recording the appellant's name in some capacity. The factum of possession being present, he would be at least entitled to have his name recorded in the column of remarks as in possession *bazaria bainama mawarkha 15th July*, 1931, the land continuing to be shown as portion of land of late Lachaman Singh's holding and the late Lachaman Singh or his successor in interest being responsible for the rent thereof.

I would let parties bear their own costs.

21-5-1935. D. L. DRAKE-BROCKMAN,
*Senior Member.*

I AGREE.

22-5-1935. K. N. KNOX,
*Junior Member.*

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IN THE COURT OF H. K. GRACEY, ESQ., C.B.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated May* 10, 1920

MISCELLANEOUS REVENUE APPEAL NO. 13 OF 1919-20

Bishwa Rup, Chandru and others of mauza Palai Malla, patti Ashwalshyun, district Garhwal ... ... *Appellants,*

*versus*

Jaman Singh and others of mauza Palai Talla, patti Ashwalshyun, district Garhwal ... ... *Respondents.*

Appeal against order of J. M. Clay, Esq., I.C.S., Deputy Commissioner, Garhwal, dated January 7, 1920.

*Held* by Mr. Gracey, that Parti-Kadim land is similar to benap waste land for purposes of village gaucher and even outside villagers can claim rights of user over it.

Claim for declaration of rights for grazing land.

ORDER.

This is a second appeal in respect of certain grazing rights. Villagers of Palai Talli sued to be declared to posses grazing rights in certain lands within the boundary of Palai Malli. It was found that the land in question consisted firstly of waste Kaisar-i-Hind land, and secondly of land that had been measured in the name of one Ramsaran, but had fallen out of cultivation. The court of first instance gave a decree for rights in the Kaisar-i-Hind land, but dismissed the suit in respect of nap land that had stood in Ramsaran's name. On appeal the Deputy Commissioner has

granted a decree in respect of nap land also. Against this portion of his decree this second appeal is filed on behalf of the villagers of Palai Malli. There can be no doubt that the villagers of Palai Talli have a right to graze their cattle on the waste lands of Palai Malli and the only question is whether the land that has once been measured and has since fallen out of cultivation is to be included in such waste lands or not.

The lower court has stated that it has recently been laid down by Government that unassessed nap land is in no way different from benap except that should the unassessed nap ever be taken up for cultivation again the previously recorded holder would have a prior claim to its cultivation if he chose to assert it. It has held that for grazing and other rights unassessed nap lands are identical with benap. In this, I think, the lower court is right. By ceasing to cultivate the land and to pay revenue therefor, the former holder must be held to have acquiesced in the land reverting to the condition in which it was before it became liable for revenue. He cannot, in fact, be held capable of relieving himself of all responsibilities and yet at the same time retaining his privileges.

I therefore find that the view .taken by the lower appellate court is correct.

The appeal is accordingly dismissed with costs.

H. K. GRACEY,
*Commissioner, Kumaun Division.*

*May* 10, 1920.

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IN THE COURT OF J. M. CLAY, Esq., I.C.S., DEPUTY COMMISSIONER, GARHWAL

*Dated August* 23, 1918

CIVIL APPEAL NO. 82 OF 1918

Madhba Nand, Bhajan Dat, Bala Dat, and others of village Simtoli, patti Dhanpur ... *Defendants-Appellants,*

*versus*

Ishwari Datt, of village Golabrai, patti Dhanpur ... ... ... ... *Plaintiff-Respondent.*

Appeal against the order of Lala Prem Lal Sah, B.A., Deputy Collector, Barahsyun, dated June 12, 1918.

*Held* by Mr. Clay, that the sale of Parti-Kadim unassessed land recorded in the name of vender is null and void.

JUDGMENT.

The facts in this suit are quite clear. The defendants-appellants, who are some of the hissedars of mauza Simtoli, pargana Dhanpur, sold a piece of land, 232 12/16 nalis in area, to one Lacham Singh, who proceeded to build a house on it. This piece of land formed part of the land recorded at the settlement as Gaon Sanjayat. It was shown as parti-qadim, partabahik, and no revenue was assessed upon it. It has been continuously used as grazing land ever since until its sale to Lacham Singh, and it is in evidence that it contains a large number of chir trees. It is in fact, exactly similar to the adjoining benap land which is protected forest.

Subsequently Tara Datt, Ishwari Dat, two hissedars of Simtoli who had not taken part in the sale of the suit land, sued for cancellation of the sale-deed and in the alternative for pre-emption. The court below decided that Tara Datt had acquiesced in the sale, but he gave Ishwari Dat a decree cancelling the sale-deed so far as his share in the suit land was concerned and giving him a mandatory injunction for the demolition of the house built, despite warnings by Lacham Singh. The alternative petition for a pre-emption decree was dismissed.

Both parties now appeal. This judgment will therefore govern civil appeal no. 84 of 1918 also. Ishwari Datt *versus* Madhba Nand and others.

The first point for consideration is whether the appellants had full proprietory title over the land which they purported to sell.

As to this there have been two recent rulings which bear on the point. The first of these is special civil appeal no. 30 of 1915 Dhauklau *versus* Deb Singh (Commissioner's Court). In this suit a declaratory decree had been obtained that certain land was gaucher. This decree was appealed against on the ground that the land, which was parti-qadim unassessed to revenue but recorded in the names of the appellants, could not be gauchar and common land because it was the appellants' nap. The Commissioner in his judgment said: This entry (of the appellants' names, as hissedars) hissedars does not mean that the land was settled with the defendant and cannot be grazing land, it only means that prior to the present settlement the defendant-appellant had cultivated the land, but since then had permitted it to be fallow, and at times of settlement it was old fallow the last cultivator being the defendant-appellant. Defendant-appellant certainly did not engage to pay revenue nor does he pay revenue for it.

This decision was appealed against under section 17 of the Kumaun Rules to the Local Government and the appeal was rejected.

The other analogous case is miscellaneous revenue appeal no. 16 of 1915-16 Gulab Singh *versus* Jwala Ram (Commissioner's Court). In this case a recorded hissedar of parti-qadim land paying no revenue, sued to eject a tenant whom he had himself put in. The suit was dismissed and the Commissioner upheld this decision, remarking: " The court of

first appeal holds that the plaintiff-appellants have not got the full status of a hissedar over the land in suit, and until they have received a nayabad grant over the land, they cannot come into the revenue courts. I am inclined to agree with the Deputy Commissioner in this finding".

These two rulings, one of which has been up to the Local Government make it clear that hissedars of parti-qadim beparat land, paying no revenue, have not got full proprietory title over such land and cannot treat the land as their own in full possession. If this is so they cannot alienate the land by sale or gift.

Consequently the sale of the land in suit in this case must be absolutely null and void, for lack of capacity in the vendor to sell.

But even if this proposition be not admitted and it be held that the recorded hissedars have the power to sell such title or the entry of their names as hissedars in the settlement papers may confer on them, there is still no reason why this appeal should succeed.

There is no doubt that the plaintiff Iswari Datt had a right to be consulted before this sale of so-called common land took place and that, since his consent to the sale was not obtained, he is entitled now to object to it. As the court below points out, Iswari Datt had a right to a share, on partition, in each thok: and it is no argument to say that his rights have not suffered because less than half the recorded common land of the village has been alienated.

I may refer to a case, which is on all fours with the present one, viz. suit no. 173 of the Barahsyun Court of 1913, Tek Ram *versus* Kali Ram, in which a decree for cancellation of a sale-deed and a mandatory injunction for demolition of a house, built on common land, was given. This suit went on appeal to the Commissioner's court without success.

In the present suit too an absolute cancellation of the sale deed should, I think, have been decreed.

A point is raised in the cross-appeal as to court-fees. Court-fees were paid originally on Rs.2,500, the value (alleged by defendants) of the suit land for which pre-emption was sought. In appeal fees on Rs.900 only were paid, the sum at which the court below found that the land had actually been sold. I am asked to order a refund. I see no reason for this. Both in the trial court and on appeal a decree for pre-emption is prayed for the alternative and fees have been paid on the alleged value of the land in suit.

I therefore modify the decree of the court below. I give Iswari Datt a decree declararing the sale-deed in suit absolutely null and void. The mandatory injunction is maintained. Ishwari Datt is entitled to full costs in both courts and will get them, as he has completely succeeded in his suit.

J. M. CLAY,

*August* 23, 1918. *Deputy Commissioner.*

IN THE COURT OF P. WYNDHAM, ESQ., O.B.E., C.I.E., I.C.S., COMMISSIONER, KUMAUN DIVISION

*Dated December* 21, 1920

MISCELLANEOUS REVENUE APPEAL NO. 37 OF 1919-20

Diwan Singh, Govind Singh and others through their Mukhtar Daulat Singh of village Binodu Naugaun, patti South Manyarsyun, district Garhwal ... *Appellants*,

*versus*

Gulab Singh, Rup Singh, Narain Singh and others of the same place ... ... ... ... *Respondents*.

Appeal against the order of P. Mason, Esq., I.C.S., Deputy Commissioner, Garhwal, dated July 3, 1920.

Claim : For gaucher right.

*Held* by Mr. Wyndham, that villagers can claim rights of user over parti-kadim land even after it has been brought under cultivation or assessed to revenue; their cause of action arises when it was first brought under cultivation or assessed to revenue.

ORDER

(APPEALS NOS. 36 AND 37)

These are second appeals in a revenue suit for declaration of gauchar (grazing) rights under section 14, no. 1190/I—627 of June 30, 1916.

The land in suit is measured (nap) but is unassessed to revenue (beparat) the claim is as regards five numbered fields.

The court of first instance finds that as the land is measured and recorded in the names of the defendants it could not be common pasturage and the application was dismissed.

On appeal the learned Deputy Commissioner has on the facts held that two numbers can be used for gaucher by the plaintiffs and refused it as regards three numbers.

Both sides have appealed against this finding.

The case has been obscured somewhat by the use of the word khaikar in the settlement records against these five fields and by the courts considering perhaps that defendants were mere khaikar holders.

The defendants who are co-hissedars in this village along with the plaintiffs have been entered at settlement as khaikar tenants of these five plots.

Now the first point to decide is the meaning of this entry.

It is an admitted fact acknowledged by the parties before me today that there is only one khaikari holding in this village and that is assessed to rent. These holdings pay neither revenue nor rent the land being

unassessed. To call such lands khaikari lands in the settlement records is a clear misuse of terms. I reject all idea of treating these fields as a khaikar tenant holding.

The only meaning one can read into this record is that these lands which settlement shows were uncultivated at the time were, previous to and up to the time of settlement, lands with the recorded hissedars (the defendants) in this suit had cultivated or exercised some exclusive right of user there over.

The next point for the court to decide is whether a general right of grazing (gauchar) over these lands can be claimed by the plaintiffs in the face of this entry.

Settlement entries against partikadim lands have in Kumaun been given a very limited value, they have been interpreted to mean (and Government have accepted the interpretation in civil litigation) that the recorded owners of such partikadim lands have the first claim to cultivate such lands if they wish to break them up.

There are two conflicting rights asserted over those lands:

(i) The right of user for purposes of grazing common to the village community and now claimed by the plaintiffs.

(ii) The somewhat indefinite right of ownership which the recorded holders of partikadim lands exercise and which at least will amount to a priority to cultivate if cultivation is undertaken.

It is impossible to permit a plea for right of user to be brought until a cause of action arises and cultivation or say enclosure is started and in this suit I would only be prepared to consider the plea in the case of 931 and nali of 932, which are under cultivation as regards the rest of the land in suit no cause of action has arisen.

To consider the case no. 931 and one nali of 932 (area $5\frac{1}{4}$ of no. 931, 1 nali of 932).

Usually when considering conflicting rights of cultivation and grazing it is a guide to consider areas in this case the area which has come under cultivation in only $6\frac{1}{4}$ nalis about $\frac{1}{3}$rd share of a statute acre this would hardly feed $\frac{1}{3}$rd of a cow, if grazed all the year round, the effect on cultivation is infinitesimal, this is not the exact ground on which the lower appellate court has come to the same conclusion in favour of the defendants but as the question is a mere question of fact I see no reason to interfere and the plaintiffs' claims for gauchar and user are refused, but as held above the defendant's rights are no longer khaikar.

As regards other numbers I have already held that no cause of action has arisen.

This order governs appeals nos. 36 and 37 can be filed in no. 36.

Costs on the plaintiffs in all courts.

P. WYNDHAM,

*December* 21, 1930. *Commissioner, Kumaun Division.*

# PART III
## Commentary

### CHAPTER I—Village Boundaries

Previous history.

"The object of village boundaries is both to assess revenue on definite areas and to secure all classes of rights which also subsist on the land" (Land systems of British India by Baden Powell, Volume II, page 32, Article II). The revenue decisions of the various courts in Kumaun on village boundaries are given in Part I, Chapter I, of this book. But to understand the principles underlying those decisions and reconcile or correct the conflicting decisions of the courts, it is necessary to know the previous history of the subject. I shall therefore give a brief history of village boundaries in Kumaun before discussing the various decisions.

There is no doubt that every village in the Kumaun hills has a fixed boundary within which the inhabitants of that village exercise various proprietory and other rights of user. These boundaries have existed since the time of Indian rulers.

It is true that the Rajah could assign or sell any village and give grants of land within it to any one. Still the actual cultivators of the land were not disturbed in their possessions, and in the exercise of their rights in the waste lands within their villages. They could even exclude other villages from encroachments within their village boundaries and levy grazing and other taxes. During the 25 years of the Nepalese rule in Kumaun, immediately preceding the British occupation in A. D. 1815 there was, it is alleged, general devastation in villages—the population decreasing to an alarming extent, and flourishing villages being converted into jungles. British administration of Kumaun dates from 1816, when Mr. Gardner was appointed as the first Commissioner of Kumaun. He was succeeded by Mr. Traill who made the first Settlement of Kumaun in 1822-23, which is known as the san 80 Settlement, or "The Great Measurement." Mr. Traill simply recorded the boundary descriptions of villages in a book or register. He also recorded the cultivated areas within those boundaries and assessed land revenue on them. No maps were prepared showing the boundaries. Mr. Traill, in settling the boundaries of each village, seems to have recognized the lands lying within those boundaries as belonging to that village as will be shown later on.

San 80 Boundaries

The boundaries fixed by Mr. Traill were very rough and often inaccurate, as stated by Mr. Batten in his Settlement Report, page 527.

San 96 Settlement.

The next settlement of Kumaun was made by Mr. Batten in A.D. 1839 There were numerous boundary disputes which were decided by either special oaths or panchayat. San Assi boundaries were revised and fuller boundary descriptions given.

Beckett's Settlement, 1859-65.

The next settlement of Kumaun was made by Mr. Beckett in 1859-65. Village maps were prepared for the first time in that settlement showing the San Assi boundaries. Mr. Beckett generally adhered to the San Assi boundaries and showed them in his village maps. He, however, corrected them wherever he found errors.

Pauw's Settlement, 1892-96.

In the next settlements of Mr. Pauw in Garhwal (1892-96) and of Mr. Goudge in the Almora and Naini Tal Districts the San-Assi boundaries have been completely ignored and only the measured areas of villages have been shown in the settlement maps. The waste lands known as benap were not measured in any village maps.

In spite of these variations in the successive settlements the San Assi boundaries have always been recognized as the traditional boundaries in the various Government notifications and decisions.

The reasons why all waste and forest lands within the village boundaries were excluded from the Messrs. Pauw and Goudge's settlement papers seem to be that under the Government notification no. 869F, 638-44, dated October 17, 1893, all benap waste land was declared to be district protected forest under the Indian Forest Act.

Forest Settlement of Kumaun, 1911-15.

In the Forest Settlement of Kumaun in 1911-15, no consideration was made of San Assi boundaries in making reserved forests and giving rights and concessions to villagers in these forests.

The above review of the past history of village boundaries in Kumaun will show that the village boundaries though often of longstanding have, as circumstances changed, been modified and even ignored by the authorities, some of whom have even called them merely " nominal " boundaries having only " an attenuated legal existence."

Case law.

As regards the case law on the subject some courts have held that San Assi boundaries are not sacrosanct, and, if they have been modified at the subsequent setttement or by judicial decisions, the subsequently modified boundary should be accepted as the correct boundary. This is the latest case law on the subject. But Mr. Wyndham, in Buthar Singh and others *versus* Gaur Singh and others, Rev. no. 37 of 1926-27 had held that the San Assi boundary should be accepted in preference to the subsequent settlements boundaries. This is no longer good law.

As regards the jurisdiction of revenue courts to decide boundary disputes there have been conflicting decisions. In some early cases the revenue courts of Kumaun had held that the San Assi boundaries being merely nominal without legal existence no suit lay for their declaration. The suit should be merely for declaration of rights of user over the waste lands lying within it. *See* Miscellaneous Revenue Appeal 18 of 1920-21, Shri Ram *versus* Tula Ram. This view, however, has now been rejected, and suits for bare declaration of village boundaries do lie. But the question whether such a suit for bare declaration of village boundaries lies under the Nayabad Rules or under sections 41 and 51, Land Revenue Act, as extended, to Kumaun, or, in the civil court, does not seem to have been finally settled. In Revenue Appeal 17 of 1918, Pancham Singh *versus*

Dewan Singh and others, the Board of Revenue held that such suit lay under section 41, Land Revenue Act. But in subsequent decisions of the Commissioner of Kumaun and the Board of Revenue it has been held that such suits lie under the Kumaun Nayabad Rules. The leading case on the subject is, Miscellaneous Revenue Appeal 28 of 1932, Sher Singh and others *versus* Ratan Singh and others. In revision petition number 5 of 1933-34 to the Board of Revenue, Mr. Drake-Brockman (now Sir Digby) held that boundary suits lay under rule 36 of the Nayabad Rules of 1931 and that no revision lay to the Board.

He, however, made *obiter dicta* to the effect that boundary disputes should be decided by the Settlement Record Officers during the Settlement Record Operations under section 51, Land Revenue Act; there being a right of appeal to the Board of Revenue under that section ; and that decision must be binding on all revenue courts under section 57 of the Land Revenue Act.

If this be the correct view, the question still remains, whether, if the dispute regarding village boundaries has not been decided by a Settlement Court, a suit for bare declaration of village boundary lies in a civil or revenue court. Also whether after the decision of such dispute by a Settlement Court, the party aggrieved can still sue in a civil court; as such a suit does not seem to be excluded under section 233 of the Land Revenue Act.

In petition no. 22 of 1932-33, Trilok Singh and others *versus* Prem Singh and others, the Board of Revenue appear to have held that all suits for declaration of rights of user in waste lands lie in the civil courts.

The whole case law on this subject seems in a hopeless confusion and it seems desirable that there may be a definite ruling laying down the correct law and procedure.

I venture to think that all boundary disputes should be finally settled during the settlement or record operations. In cases where such disputes have not been decided by the Settlement Officer, a suit for the determination of village boundaries should be filed in the revenue court under either section 41 or 51, U. P. Land Revenue Act, as extended to Kumaun, there being a right of revision to the Board of Revenue as held by the Board in Pancham Singh *versus* Dewan Singh mentioned above ; and not under rule 36 of the Nayabad Rules as subsequently held by the same court. There is no express provision under the Nayabad Rules regarding boundary disputes.

## CHAPTER II—Waste Lands

The subject of waste lands in Kumaun, which is closely connected with village boundaries is a highly controversial one. While the official view, dating back to the time of Mr. Batten is that all waste lands and jungles lying within the San Assi boundaries of villages in Kumaun are the property of Government, over which the villagers have rights of user only, public opinion is that it is the property of the villagers.

Baden Powell.

Baden Powell in his Land Systems of British India, Volume II, pages 3 to 15, paragraph 1, says, "It seems that except in the case of considerable jungles that were obviously excluded from the known areas of villages, the waste was always allowed to and included in, the adjoining estate by the name of which it is known."

Previous history.

I will now try to review very briefly the previous history of the subject in order to understand the case law properly. As stated above in Chapter I under village boundaries Mr. Traill, by demarcating the village boundaries in 1823, intended to give full proprietory rights to villagers within their boundaries. The political conditions of Kumaun also necessitated this policy. Most of the villages in Kumaun then were either deserted or in ruins, very little cultivation was left. The policy of the Government then was to give the people full scope for extension into and reclamation of waste lands without the least interference in the exercise of their customary privileges in the forests and waste lands within their villages. Under this wise policy villages soon recovered from the desolate state into which they had fallen during the Gurkha rule, with the result that, between Traill's Settlement of 1823 and Batten's Settlement of 1838-43, cultivation flourished and population increased rapidly; large tracts of waste lands were reclaimed by villagers; the land revenue was doubled.

In 1827 Dr. Boyle suggested to Lord Amherst the probability of successful cultivation of tea in the mountains of Kumaun. In 1834 a Committee was appointed by Lord Bentinck, the then Governor General of India, to report on the subject. The report of the Committee was favourable. In 1837 an Act was passed, Act IV of 1837, by which Englishmen could hold landed property in India.

It was finally decided by Government, on the proposal formulated by Mr. Batten, Commissioner, Kumaun, to start Government tea plantations at Gadoli, near Pauri, and other places in Kumaun, for which large tracts of waste lands were taken from adjoining villagers. Waste lands were also given to European speculators for tea cultivation, as "fee simple grants" with practically sovereign rights over them. It was under those circumstances that in Mr. Batten's settlement of Kumaun in 1837-43 the former policy of Government underwent a transformation, and it was laid down that villagers had no proprietory rights over the waste lands and forests in Kumaun, as Mr. Batten says in his Settlement Report, page 528, paragraph XVI, "I therefore take this opportunity of asserting that the rights of Government to all the forests and waste lands not included in the assessable area of the Estates remain utterly unaffected by the inclusion of certain tracts within the boundaries of mouzahs, and that no one has a right merely on account of such inclusion to demand payment for the use of pasture ground; or for the permission to cut timber or firewood."

This policy in connexion with waste and forest lands of Government was reaffirmed by Mr. Beckett in his settlement of 1863; and strongly supported by Sir Henry Ramsay, Commissioner, Kumaun, in his forwarding letter of Beckett's Settlement Report to the Board. In paragraph 7

of the letter he says, "Did the fact of the attention of the Government having been drawn to its own rights in the waste lands by the application of European speculators for lands on which to grow the great staple product, tea necessitate or render advisable the actual demarcation of separate village boundaries?" Further on he admits that, "the former policy of non-interference in the waste lands or leaving the rights of the estate and the people commingled and undivided throughout the greater part of the mountain tracts had to be abandoned owing to the tea plantation question." It was on the basis of these remarks of Mr. Batten and Sir Henry Ramsay that Baden Powell in Chapter V, section II of his Land Systems of British India under the head 'Kumaun and Garhwal' stated, "It would appear that in many cases, the jungle or grazing land was in Mr. Traill's early settlement included within the nominal boundaries of villages—that is, it was known by the same name. But it does not follow that it belonged, in any proprietory sense to the villagers."

Present legal position.

The present legal position of the waste lands in Kumaun has been summed up by Mr. Stowell in his Manual of Land Tenures, edition of 1919, page 147, paragraph 7, thus: "The Sal Assi boundaries were merely convenient divisions of the district, a Nominal allotment of waste" and conveyed no proprietory rights over waste and forest land to the villagers, though in most cases they corresponded with the village customary rights of grazing and timber rights, especially in the more closely cultivated tracts."

It may be mentioned, however, that Government have declared that as regards the waste lands of Kumaun, the people are the beneficiaries and the Government are their trustees.

Case law.

I shall now discuss the case law on the subject. The case law under this head may be divided under (1) Nayabad grants; (2) genuine extensions into the waste benap lands and (3) rights of user. Nayabad grants and genuine extensions are regulated by the Nayabad Rules sanctioned by Government under the Scheduled Districts Act. The present Nayabad and Waste Land Rules are contained in Government notification no. 612/14—312 (24), dated August 1, 1934.

*Rights of user*—Such as gauchar rights, rights to cut fuel and timber and grass in the forest and waste lands are governed by customary and prescriptive rights of user. They are recorded in the halatgaon (wajibul arzes) of villages and in the Forest Settlement rights lists in the reserved forests.

There are some points calling for comment in connexion with Nayabad grants; genuine extensions; and rights of user in waste lands. In the old decisions of courts entries in the halatgaon of the previous settlement regarding grass, fuel and grazing rights of one village within the boundary of another village, were excepted as *prima facie* evidence of such rights. But in the case of Miscellaneous Revenue Appeal no. 32 of 1921-22, Kalam Singh *versus* Netra Singh, Mr. Wyndham, Commissioner, rejected such *ex parte* entries, unless there was corresponding entry in the servient village halatgaon; which is never the case. Since then the evidentiary

value of such halatgaon entries has been very much weakened. Mr. Stowell considered these village memoranda of great evidentiary value, *vide* page 153, last paragraph of his Manual. These halatgaon, which, prepared under instructions of the Board of Revenue during the Revenue Settlement, contain a record of customary rights and have remained unchallenged during the forty years which have elapsed since the last settlement are entitled to great weight.

The next point I should like to discuss is the question of home cultivation having preference over the user rights of outside villages in waste lands. Mr. Wyndham for the first time laid down the principle that even if an outside village has rights of user within the Sal Assi boundary of another village, the former cannot restrain the latter from applying for Nayabad grants, or making genuine extensions in such land. This principle has been followed by the Kumaun Courts and in one or two recent rulings by the Board of Revenue. But in the latest case, M. R. A. No. 81 of 1933-34, Tula and others *versus* Ganga Datt and others, Mr. Owen, Deputy Commissioner in charge, Kumaun Division, has held that in view of the changed agricultural conditions of Kumaun that principle no longer holds good.

There is no doubt that some villages have been exercising gaucher, grass and fuel rights in the waste lands within the boundaries of neighbouring villages. Their rights were admitted by the servient village in Beckett's Settlement and were recorded in the halatgaon of Pauw's Settlement. In some cases rights have also been recorded in the Forest Settlement rights lists. But of late the tendency of each village has been not to allow outside right holders to come within their village boundaries for exercise of those rights. They will cleverly apply for Nayabad grant or extend cultivation over such debatable areas without objection by their own villagers and obtain a Nayabad grant; leading to future litigation. Needless to say, the servient village win on the principle of home cultivation having preference over outside rights of user. Such decisions operate harshly in some cases, where an outside village entirely depends on its neighbouring village for grazing and grass and fuel. In such cases, I think, Mr. Owen's decision referred to above is sound. In clear cases where the easementary and prescriptive rights of an outside village have been proved in certain tracts of waste lands lying within another village, the latter should have no right to reclaim it or otherwise restrain the former from the exercise of those rights.

As regards the rights of individual villagers to reclaim waste land, various decisions have been given by different courts. There is no doubt that there is a general tendency for land grabbing, in which the most influential member of the village community often succeeds to the detriment of the interest of his weaker neighbour. I am, therefore, entirely in favour of the Government policy to make such grants only to the needy after careful enquiry. The recent rulings of the Commissioner restricting such grants to the needy are sound. But there cannot be one uniform standard; and each case should be decided on its own merits.

There is one more point of some importance in connexion with the rights of user in waste lands, which has not been touched upon by Mr. Stowell in his Manual of Land Tenures—namely, whether a non-resident co-sharer of a village has equal rights of user with resident co-sharers in the waste lands of that village. Sir Henry Ramsay in some cases held that non-resident hissedars have no such rights. Some other later decisions are also to the same effect. But recently Mr. Stubbs, Commissioner, in Misc Rev. Appeal no. 103 of 1931-32, Pitambar Datt and others *versus* Badri Datt, has held that non-resident hissedars have equal rights with resident hissedars. To me, however, with my long experience of village life in Kumaun it seems that non-resident co-sharers, who do not contribute towards the village Panchayati Funds, or take part in its internal management, should have no such rights.

Mr. Owen, Deputy Commissioner in charge, Kumaun, in Misc. Rev. Appeal no. 92 of 1932-33, Govind Ram *versus* Shib Ram, has held that a suit for declaration of user rights in waste lands lay in a civil court. But as admitted by Mr. Owen himself in later decisions that view is wrong. All claims for rights in waste lands lie in the revenue courts under rule 36 of the Nayabad Rules of 1934.

In petition no. 5 of 1933-34, Sher Singh *versus* Ratan Singh and several others, subsequent decisions the Board of Revenue have held that no revision lay under the Nayabad Rules of 1931 and 1934, from a decision of the Commissioner under rule 36 of those rules; though there was a right of revision under the old Nayabad Rules of 1916. It is true that there is no express provision in the new Nayabad Rules for revision to the Board. There is a right of revision in suits for ejectment of a sirtan from even half a nali of land under the Kumaun Tenancy Rules. Surely, the omission of such right under the Nayabad Rules, would operate harshly in cases involving important questions of vital public interest, such as disputes about village boundaries and rights of user over considerable areas of waste lands. The Government have recently amended the Nayabad Rules granting suit right of revision to the Board of Revenue.

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## CHAPTER III—Pakka Khaikars

Stowell on pakka khaikars.

There are few subjects in Kumaun which have led to more conflicting decisions and constant litigation than pakka khaikari villages. Mr. Stowell on page 83, paragraph 3 of his Manual of Land Tenures in Kumaun says, "These khaikari villages have always been and still are the object of constant attack by the hissedars anxious to effect an entry and break down their privileged position; and there are perhaps few classes of tenants and other agriculturists in India who have suffered more from a confusion of terminology and from the ignorance of the history and peculiarities of their tenure too often displayed by the courts in deciding the fights over these villages."

Ramsay's definition,

The history of these pakka khaikari villages is given on page 51 of Sir Henry Ramsay's forwarding letter of Mr. Beckett's Settlement Report

of Garhwal of 1863, from which I quote the following: "If the Board will take the trouble to consult the data recorded by Mr. Traill, a few years after the introduction of British rule, they will find that the right of cultivating occupancy remained with the descendants of former grantees, (Thatwans), even when the grant of proprietory right had been conferred by the sovereign power on new superiors; and that in all cases whether of such descendants or ordinary cultivators continuing from father to son in the undisturbed use of their ploughs; the contracted state of the land has always been sure to secure the most favourable terms to the occupant tenants of the soil."

"Practically, therefore, the latter, if found to be rightful claimants of the title khaikar, whether as ex-Thatwans or as uninterfered with and necessary cultivators are kept in possession, so long as they pay their quotas of Government revenue plus a small amount of malikhana including malguzari fees, though they so far differ from their Thatwans co-villagers inasmuch as they cannot alienate it."

**Pauw's definition.**

Mr. Pauw, on page 33 of his Settlement Report, defines these khaikars thus, "Firstly, we have those khaikars who represent the original cultivating proprietors of the land and who were deprived of their independent right by grants or assignments of the proprietory rights under native rule, or were by fraud or force reduced to the status of khaikars by usurping Thokdars, Mafidars or Padhans in the early days of British Rule."

**Pakka khaikars are under-proprietors.**

The whole confusion on the subject has arisen owing to the use of the term khaikar for both pakka and kachcha khaikars, in the various settlement reports and decisions of courts. There is not the least doubt that the status of pakka khaikars is that of under-proprietors, as held by Messrs. Pauw, Goudge and Stowell. They should, therefore, have been called "Malik adna" or under-proprietors, instead of khaikars.

**Constant warfare between pakka khaikars and non-resident hissedars.**

Mr. Beckett in his Settlement of Garhwal of 1859-65 had first recorded the khaikars of these pakka khaikari villages as proprietors. But Sir Henry Ramsay, on appeals, recorded them as khaikars. Since then a constant warfare has been going on between the non-resident hissedars and these resident khaikars; the former always trying to effect an entry into those villages, and the latter resisting them. Needless to say, the hissedar, being more influential, often gets the upper hand in these contests; with the result that a large number of these under-proprietory villages have been reduced to the status of kachcha khaikari or mixed villages. Still there is a considerable number of villages which have survived those attacks.

**Pauw's list of pakka khaikari villages.**

Mr. Pauw at the last settlement of Garhwal compiled a list of villages in which proprietors had no khudkasht cultivation in 1862 (Beckett's settlement). Appendix II of Pauw's Settlement Report contains the list of such villages in Garhwal. Several villages, however, in which hissedars have been found is subsequent judicial enquiries to have had no cultivating possession at Beckett's settlement have been omitted from that list. Still these lists are very strong evidence in favour of the pakka khaikari villages.

Invasions by hissedars.

I shall now describe the various ways in which the non-resident hissedars invade these pakka khaikari villages in order to effect an entry and thereby destroy their pakka khaikari status. The following illustrations have been taken from the decisions of courts :—

(1) The hissedar managed to have a small plot of land recorded as his khudkasht at Beckett's settlement and the khaikar then actually cultivating it as sirtan. The hissedar, however, had never been in khudkasht possession. The village was not, therefore, entered in Mr. Pauw's list of pakka khaikari villages. Only recently the hissedar tried to eject the sirtan who naturally resisted. On the suit for declaration of pakka khaikhari status of the village and the so-called sirtani land, it was held that the hissedar, not having been in actual cultivating possession, the mere entry of khudkasht in settlement papers did not affect the status of the village. The sirtan was declared pakka khaikar of the land—Misc. Rev. Appeal no. 14 of 1925-26, Bairagi and others *versus* Musammat Saraswati.

(2) In another case the non-resident hissedar malguzar got the padhanchari land in the pakka khaikari village recorded in his khudkasht and the ghar padhan as sirtan at Beckett's settlement. The village was accordingly omitted from Pauw's settlement list of pakka khaikari villages. On a suit being filed by the panch khaikars for declaration of pakka khaikari rights the village was declared to be pakka—S. R. A. no. 22 of 1922-23, Gulab Singh *versus* Thagwa.

(3) In the Sankrori case, Rev. Appeal no. 29 of 1926, Chait Ram and others *versus* Banwa, the hissedars had managed to get 56 nalis of land recorded as their khudkasht at Beckett's settlement, and the old khaikars who were in actual cultivating possession entered as sirtans. Subsequently the hissedars managed to resume some lapsed holdings in the village and took actual khudkasht possession of those holdings and settled down in the village. The village was not entered in pakka khaikari list at Pauw's settlement. The hissedars filed a suit for ejectment of the sirtans. It was found that the sirtans were the old pakka khaikars who had been in cultivating possession and that the hissedars had not been in actual khudkasht possession of the so-called sirtani land. Captain Ibbotson, Deputy Commissioner, Garhwal, in a long judgment, reviewing all the previous case law on the subject, declared the village as pakka khaikari village and the suit land as pakka khaikari of the tenants. This decision was affirmed by Mr. Stiffe, Commissioner, in Rev. Appeal No. 16 of 1925-26. This is the leading case on the subject.

(4) In S. R. Appeal no. 22 of 1923-24, Gulab Singh *versus* Thagwa, the hissedar had got the malguzari land recorded as his khudkasht at Beckett's settlement with the ghar padhan as sirtan. In 1874 the hissedars got some more land recorded as their khudkasht, with the tenants actually cultivating it as sirtans. They subsequently got the land formally partitioned through court among themselves. The village was omitted from Pauw's list of pakka khaikari villages. In 1920 the hissedar attempted to eject the tenants. The tenants sued for declaration of pakka khaikari rights. Their suit was decreed in appeal by Mr. Acton, Deputy

Commissioner, Garhwal, whose decision was upheld by Mr. Wyndham, Commissioner.

(5) In another case Bhola Datt *versus* Sarop Singh, Rev. Appeal no. 34 of 1925, some of the pakka khaikars bought off the hissedari rights in the major portion of the pakka khaikari village. Only a few old khaikars survived. One of the khaikars died issueless and the khaikar hissedars wanted to resume the holding, claiming the village to be kachcha khaikari. Captain Ibbotson decreed the holding to the collateral heirs of the deceased khaikar, declaring the village pakka khaikari, the judgment was upheld by Commissioner in Appeal no. 11 of 1925-26.

In this and the Sankrori case Mr. Wyndham, Commissioner, laid down the principle that a pakka khaikari village cannot be reduced to a kachcha one unless the invasion of the hissedars is extensive and sustained. But the term " extensive " and " sustained " have not been defined in any case.

(6) In some cases including the series of the Lakhora cases referred to in Mr. Stowell's Manual, page 90, a contrary view has been held, that if a hissedar succeeded in getting a number of lapsed holdings recorded as his khudkasht through a series of years the status of the village is destroyed. This view was also held by Mr. Stiffe in a recent case, S. R. appeal no. 17 of 1926-27, Rup Singh and others *versus* Mohan Singh and others.

Pakka khaikari villages are under-proprietory villages.

In view of the old history of these pakka khaikari villages, given above, and the whole case law on the subject, the correct view seems to be that all such villages should be classed as under-proprietory villages. A list of these villages should be prepared after a full inquiry during the present settlement operations. According to previous decisions and Mr. Stowell, the hissedar should be recorded as pakka khaikar of his khudkasht land in a pakka khaikari village ; while according to the view of Mr. Stiffe, Commissioner, in the Sankrori case referred to above, it should be recorded as his khudkasht. It is submitted that the latter view is not correct, as it will lead to future complications and quarrels. The hissedar should be recorded as under-proprietor of his khudkasht along with the other pakka khaikars with equal status in such land. Thus the question of sustained and extensive invasion will not arise. Even if the hissedar succeeds in taking khudkasht possession of the major portion of the village land it will still continue to be under-proprietory village.

There have been conflicting decisions as regards the application of serial nos. 16 and 21 of Schedule II of the Kumaun Tenancy Rules, 1918, to suits for declaration of pakka khaikari rights, and limitation for such suits. In some cases the infringement under serial no. 16 has been held to have occurred when the land was first recorded as khudkasht. In others the cause of action was held to have risen from the actual ejectment of the khaikar from the holding. According to the rulings of the various High Courts a fresh cause of action arises at every fresh invasion. This principle should also govern cases of pakka khaikari rights.

Jurisdiction.

Another vexed question regarding suits for declaration of pakka khaikari rights is that of jurisdiction. Formerly suits for a declaration

that a village was pakka khaikari used to lie in the Revenue courts. In fact the whole system of land tenures in Kumaun has been built up by the Revenue courts. The jurisdiction of Revenue courts in such cases had never been doubted before.

Recently, however, the Board of Revenue, in Trilok Singh *versus* Prem Singh and others, and Krishna Nand *versus* Daulat Singh and others, have held that declaratory suits regarding the status of khaikhari villages cannot be brought under the Kumaun Tenancy Rules of 1918, either by the khaikars of pakka khaikari villages, or by the hissedars of a village which they think is not a pakka khaikari village.

Though the Board have not expressly laid down in those rulings that such declaratory suits should lie in the Civil court this seems to be the implication of those rulings, and the courts in Kumaun have interpreted them in the same sense.

The result is, that all suits for declaration of the status of pakka khaikari villages, which formerly used to be tried exclusively by the Revenue courts, are now being filed in civil courts. The civil appellate courts have little experience of the peculiar " unwritten law " of the Kumaun Land Tenures ; and are not likely to understand the complicated questions regarding pakka and kachcha khaikari villages. Nor will the civil courts be bound to follow the previous decisions of the revenue courts. There is, therefore, danger of the whole body of the revenue case law on the subject being swept away and the Civil courts having to write on a clean slate.

It is, therefore, submitted that this anomaly should be removed either by a judicial pronouncement of the Hon'ble Board of Revenue, or if necessary, by amending the Kumaun Tenancy Rules of 1918, so as to expressly provide for suits for declaration of the status of pakka or kachcha khaikari villages.

Since the writing of the above remarks I have been favoured with a note by Sir Digby Drake-Brockman which is reproduced below :

Sir Digby Brake-Brockman's note.

" The two rulings are complementary to one another and in the second I took pains to try and correct certain conclusions which have been made from the first.

In the heading to the first, I am credited with saying that, " a Revenue court have no jurisdiction to declare a village a pakka or kachcha khaikari village such a suit lies in a Civil court."

Mr. Owen in certain cases decided by him and reported immediately following the report of petition no. 22 of 1932-33 no doubt took the view that this had been the pronouncement of the Board, but nowhere in the judgment have I said what the heading credits me with saying and in particular (that I held or) that " such a suit lies in a Civil court." What I did say was (*vide* page 114) that " a Revenue court had no jurisdiction *under serial* 16 to grant a declaratory decree to the effect that a village is a pakka khaikari village." The latter ruling is complementary to this and lays down that while pakka khaikars, or persons claiming

to be such as a body can only bring a suit under serial 16 to challenge an infringement of their common rights as such and must at the same time seek consequential relief under the appropriate serial, in order to enable the court to execute its decree, a declaratory suit being incapable of execution by itself, a hissedar can only bring a suit under serial no. 21 against an individual tenant and not against the whole body of khaikars to get a declaration that all the khaikars are kachcha khaikars, that when such suits are brought, the issue will inevitably arise, whether the village is a pakka khaikari village or a kachcha khaikari village and in the event of a village being found to have been originally a pakka khaikhari village, the issue will have to be determined in the light of the accepted rulings of the courts in Kumaun with reference to the point whether there have been such continuous and sustained invasions of the right of the khaikars as to destroy the status of the village as a pakka khaikari one.

I took pains to discuss the second ruling with the late Senior Member. The doctrine that a hissedar could destroy the whole status of a village by a simple suit under serial no. 21 appeared to us to be an inequitous one. He entirely concurred. It is obvious that if a hissedar comes into court and claims a declaration that a village is a kachcha khaikari one, he comes precious near, if he does not actully raise a question of proprietory title—a question which is everywhere else in India reserved for the jurisdiction of Civil courts. If a suit is brought in this form, it is clear that either party could raise the question of jurisdiction under section 4 of the Tenancy Rules, and the fact that the question has not been raised before (so far as I know) is probably due to the very blurred dividing line between the jurisdiction of Civil and Revenue courts in Kumaun and the fact that the same officers preside over both courts. The matter, however, is of importance as regards the appellate authority and final determination. However until the point is raised by some party there is no need to bother about it. The fact however remains that no such suit as a suit for a declaration that a village is pakka khaikari village (or a kachcha khaikari village) is provided for in any serial of group A of the Tenancy Rules; and section 4 says that all suits and applications of the nature specified in the first Schedule attached to these rules shall be heard and determined by the Revenue courts. No power is given to Revenue courts to go outside the strict letter of this Schedule, and the only suits that can be brought are (serial no. 16) by or on behalf of the punch khaikars of a pakka khaikari village against a landholder " on the ground of infringement of their common rights," and (serial no. 21) for " determination of the name and description of the tenant, etc." Attention may be directed to the words " a land-holder " which includes any one of a number of landholders; and " the tenant " which means a particular tenant, not a whole mass of tenants. I am therefore still quite clear that no suit framed to ask for declaration whether a village is pakka or kachcha khaikari one can be brought in the Revenue courts under any serial in the Tenancy Rules; and if either party brings a suit so framed, he should be told to amend his plaint or the plaint should be thrown out. The suit should be strictly confined (under serial no. 16) to a suit that the common rights

have been infringed by a land-holder, i.e. a particular land-holder; or (under serial no. 21) for a determination of the status of a particular tenant. In the course of the trial of such suits, the issue is bound to arise whether the village is a pakka khaikari one or a kachcha khaikari one and this issue must be decided on the evidence and the merits in accordance with what has come to be the accepted law of Kumaun. As to the question whether any such issue having been found against any party, he could go on and file a suit in the Civil court, I express no opinion. Until such a case comes into court it would be rash to hazard an opinion."

Suits for declaration of rights of user in waste land under the Kumaun Nayabad and Waste Land Rules lie in the Revenue courts. On that analogy suits of the above description also between hissedars and tenants should also lie in the Revenue courts. In Kumaun it is the subject-matter of the dispute and not the form of the relief which determines jurisdiction.

Transfers of pakka khaikari holdings not void.

Before concluding my remarks on the subject I may mention that although Sir Henry Ramsay had held that a pakka khaikari holding is not transferable all the subsequent decisions are to the effect that such transfers are not void but only voidable at the suit of the punch khakiars; the hissedar having no *locus standi*. In Revenue Appeal no. 6 of 1908-09 Indra Singh *versus* Musammat Chila, Mr. Campbell, Commissioner, affirming the judgment of Mr. Stowell, Deputy Commissioner, Garhwal, held that the hissedar could not sue for cancellation of a mortage by a pakka khaikar. The same view has been held by the Board of Revenue in Petition no. 13 of 1929-30, Dharma Nand *versus* Debi Datt, and by the Allahabad High Court in Civil Reference Gajai Singh *versus* Uchhabia, 1929, A. L. J. 309.

The Commissioner, Kumaun, has however recently issued a circular to the subordinate courts declaring all transfers of pakka or kachcha khaikari holdings void, relying on the ruling of Mr. Campbell in S. C. A. no. 6 of 1907, Ranjit Singh *versus* Ratan Singh. This ruling, however, relates to the mortgage of kachcha khaikari holding and not to pakka khaikari rights. It is, therefore, respectfully submitted that the order of the Commissioner stands in need of correction.

The above rulings are in accordance with local custom, such mutual transfers being very common in pakka khaikari villages. Pakka khaikars cannot, however, transfer their holdings outside their pakka khaikari community, so as to introduce an "undesirable alien" into the village. The punch khaikars can always object to such transfers to outsiders; or relinquishments in favour of the hissedar; while the hissedar has no *locus standi*.

## CHAPTER IV—Kachcha Khaikars

Kachcha khaikars are like the occupancy tenants of the plains and do not call for any long discussion. These khaikars cannot transfer their holdings without the consent of the hissedar. Nor can they relinquish in favour of some of the hissedars of a joint khata. A khaikar in a joint

khata cannot relinquish his share to the hissedar without the consent of the other co-tenants. There have been conflicting decisions on the question of a joint khata but it has been recently held by Mr. Stiffe, Commissioner, in S. R. A. no. 2 of 1925-26, Padam Singh and others *versus* Kishan Singh, that if the revenue papers show that the khaikars of a joint khata are really separate families and have been cultivating separately, they are not joint khaikars, though their khata is joint. This principle also applies in the case of relinquishment and succession of khaikari rights. Kachcha khaikari holdings are not transferable, though they can be sublet, S. R. A. no. 6 of 1907, Ranjeet Singh *versus* Ratan Singh. Kachcha khaikars have equal rights with the hissedars in mixed villages to get Nayabad grants and make extensions in benap lands. They can build houses on khaikari lands without the permission of the hissedar and plant trees on their holdings and sell them also. The rents of khaikars are fixed at settlement and cannot be enhanced. The status of a kachcha khaikar in Kumaun is better than that of the occupancy tenants of the plains.

## CHAPTER V—Sirtans

Definition of sirtan.

The third kind of tenants in Kumaun are called sirtans, which term literally means, who pay "Sirti" or grain rent. The term sirtan has been loosely used to connote various kinds of cultivators of land. In fact all persons holding lands who are neither proprietors nor khaikars, are classed as sirtans. This has led to much confusion and conflicting decisions. A sirtan in its true sense is a tenant at will, or year to year tenant, who has been settled on cultivated land by the hissedar, on condition of his paying rent in cash or kind. It has been held by the Board of Revenue in Lal Singh *versus* Amar Singh that no length of possession gives any occupancy rights to such sirtan. The extensions made by such sirtans of their original holdings into benap and Kaisar-i-Hind land are also their sirtani lands. But if a sirtan reclaims an "alag chak" or a separate block of benap waste lands by his own labour and expense he acquires khaikari rights over it, and cannot be ejected from it by the hissedar.

Maurusi sirtans.

There is another class of so-called sirtans, who should more correctly be called khaikars. During the early period of British rule, and even in more recent times padhans and thokdars obtained Nayabad grants of whole villages which had become waste, or large tracts of waste lands from Government and settled tenants on them. Those villages, or tracts of waste lands, were reclaimed by the tenants, who were, however, recorded as sirtans at Beckett's and subsequent settlements. These villages have been in the cultivatory possessions of the sirtan tenants, who have built substantial houses in them and made other improvements, and have been in undisturbed occupation for sixty years or more; though the hissedars have, in some cases, got leases executed by them. There is still a large number of such villages in Kumaun. The tenants of such villages were

formerly treated as ordinary sirtans and liable to ejectment on payment of compensation for improvements. But recently there has been a series of decisions by the Commissioner, and the Board of Revenue, to the effect that sirtans whose ancestors had reclaimed waste lands and have been in continued cultivating possession for considerable time cannot be ejected. They *are called maurusi* sirtans. The leading case on the subject is S. R. A. nos. 25 and 26 of 1925, Bhim Singh *versus* Jas Ram, decided by Mr. Pearson, Commissioner. This ruling has been followed in all subsequent cases by the Commissioner and the *Board of Revenue.*

As maurusi sirtans are not mentioned in any settlement papers in Kumaun, they should be classed as khaikars. Some of such sirtani villages really fall within the definition of pakka khaikari villages discussed above. They should, therefore after full inquiry be classed as pakka khaikari or under-proprietary villages.

Village artisans.

Another class of sirtans recorded in the revenue papers are village artisans who hold lands on service tenure. They are really *muafi khidmati* and should be classed as such.

Pujaris.

*Pujaris* of temples who hold the temple lands on condition of rendering various kinds of services in the temple are also classed as sirtans in revenue papers. In some cases the lands are gunth lands of the temples; in others the lands have been dedicated to the temple by the hissedars who pay the Government revenue; while the *pujari* enjoys the usufruct of the land in return for worshipping the deity. The land is recorded as the gunth hissedari of the deity and sirtan of the pujari. But the hissedars treat the *pujari* as their sirtan tenant and try to eject him, if he does not act according to their wishes. In Netra Mani *versus* Gabar Singh, Revenue Appeal no. 10 of 1904, a case of a *pujari* who had been in possession of the land for generations, Mr. Shakespeare, Commissioner, held the suit to be cognizable by Civil court. But in Balbant Singh *versus* Madhu, Revenue Appeal no. 9 of 1896, Mr. Pauw, Deputy Commissioner, Garhwal, had held that a *pujari* who had been holding the land for a considerable time and has been rendering services acquired khaikari rights. This seems to be the correct view.

Sirtans in gaon sanjayat.

There is another class of so-called sirtans recorded in the revenue papers. The individual hissedars cultivating gaon sanjayat lands are recorded as sirtans in revenue papers. These so-called sirtans are really proprietors and have been wrongly termed as sirtans, *see* Stowell's Manual, page 96. Co-sharers in the joint khata, who have been in separate khudkasht possession of their shares by private partition are also recorded in the sirtani column in the settlement muntakhib. This is wrong. The land should be entered as their khudkasht in the hissedari column in the revenue papers.

The above remarks would show that the nomenclature of the various kinds of land tenures in Kumaun is very defective. Needless to say that the confusion leads to much unnecessary litigation and calls for urgent reform.

## CHAPTER VI—Joint Holdings

Mr. Stowell has discussed the subject of partition of gaon sanjait land on pages 44, 45 and 46 and of joint holdings on pages 46, 47, 48 and 49 of his Manual of Land Tenures in Kumaun, Edition of 1928.

The main questions regarding gaon sanjait land, are (1) partition per family or mawasawar and in the proportion of the revenue paid by each co-sharer, rakam sharah;

(2) the status of a co-sharer who has been holding specific plots of goan sanjait by private partition for a considerable period, though the land continues to be recorded in revenue papers as joint;

(3) partition of gaon sanjait waste land left for village common pasture, or as fuel and grass preserve.

**Partition of gaon sanjait.**

As regards (1), the custom of partition per family or mawasawar, is very rare; and in some cases would lead to great complications, as described by Mr. Stowell. The usual practice is to divide such land in the proportion of the revenue paid by each co-sharer.

As regards (2), the land held by each co-sharer is usually entered as his sirtani in muntakhib, which is incorrect. Mr. Stowell calls such sirtans as nominal sirtans and says that their status is that of a hissedar—*vide* page 109, paragraph 4. They cannot be sirtans and hissedars at the same time. If a private partition can be proved the holder of such land is exclusively entitled to it as against the other co-sharers. There does not seem to be any clear ruling on this point; but the position is logical and legal.

**Partition of gaon sanjait waste land.**

As regards (3), it was held in an old ruling by Mr. Winter, Commissioner, in Miscellaneous Revenue Appeal no. 5 of 1908-09, dated March 15, 1909, Chandra Singh *versus* Gulab Singh of Bhitai Nandalsyun that common waste land left for village gouchar should not be partitioned. Mr. Stowell, relying on some older rulings, is of the opinion that such land could be partitioned. The writer is, however, of the opinion, that in view of the changed conditions and growing paucity of gouchar, grass and fuel, such waste or forest land should only be partitioned if the majority of the co-sharers agree.

**Joint holdings.**

The subject of joint holdings is discussed by Mr. Stowell on pages 46, 47 and 48 of his Manual. He has mentioned the laxity on the part of the people of Kumaun in getting mutations effected or applying for formal partitions of joint holdings, with the result that holdings of collateral relatives and their transferees continue to be recorded joint in revenue papers for generations, though their shares have long been privately partitioned. This leads to much litigation during the formal partition proceedings. The main questions connected with joint holdings are: (1), the status of individual co-sharers or their transferees holding specific, plots of land in a joint holding by means of private partition; (2) the extensions made by such individual co-sharers into benap and Kaisar-i-Hind land after the private partition; (3) partition of khaikars among

co-sharers in a joint khata and (4) partition of joint hissedari holding, among the co-sharers and khaikars created by one or more co-sharers in specific plots in a privately partitioned holding.

Private partition of joint holdings.

As regards (1) Mr. Stowell's view stated on page 47 of his Manual is that they cannot claim specific plots, but with due deference it is submitted that this view is not correct. On proof of a private partition and long possession of specific plots by individual co-sharers or their transferees, they have acquired exclusive title to those plots and they have every right to transfer them, as stated under the heading "Partition of gaon sanjiat land" above.

Extensions by co-sharers.

As regards (2) the co-sharers who have made extensions after private partition are exclusively entitled to those extensions. Such extensions are usually included in the joint khata and entered as khudkasht of the co-sharers who have made them. This view has been held by Mr. Bennett, District Judge, Kumaun, in a recent Civil Appeal no. 71 of 1936, dated September 21, 1936 (Kusal Singh *versus* Muli). There is no other clear ruling on the subject.

Khaikars in privately partitioned joint khatas.

As regards (3) it sometimes happens that one or more co-sharers in a privately partitioned khata recorded joint in revenue papers create khaikars in specific plots of their khudkasht share. The khaikar thus created obtains mutation in the area of the khaikari land, but not in specific plots. They are, however, unable to obtain actual possession in specific plots; nor can they apply for formal partition in court. This leads to much litigation. I think the partition rules should be so amended as to enable such khaikars to apply for partition of their khaikari plots on proof of a private partition among the co-sharers.

Partition of khaikars in a joint holding.

The last point which requires a mention is the partition of a joint khaikari holding among hissedars. In some cases khaikari holdings are partitioned in the proportion of the revenue paid by each co-sharer and sometimes khaikars are partitioned mawasawar or per family. The former custom leads to many complications, as one individual khaikari holding may be allotted to more than one co-sharer. The better method seems to be to allot the whole holding of one khaikar to one co-sharer and compensate the other co-sharers by money consideration in the proportion of revenue paid by them.

## CHAPTER VII—Water Rights

Disputes regarding water rights formerly tried by Civil courts.

The water of streams and natural springs is used by the people of Kumaun for irrigating their fields, for drinking purposes, for working mills for grinding grain. Prior to 1917 the rights of villagers to the use of such water were governed by the law of easements and the law applicable to riparian owners. Disputes regarding water rights were tried by Civil courts (*see* Stowell's Manual, page 11). There is no mention of the water of such streams and springs being the property of Government in any of the Settlement Reports. But it may be assumed that the streams and springs flowing in benap unassessed land, which is the property of

Government, also belong to it, while the villagers have only rights of user in them.

Since 1917 they are exclusively triable by Revenue courts.

It was in 1917 that rules were first framed by Government under notification no. 23/IX—165, called the "rules relating to water mills and use of water in Kumaun." There is a note under rule 1 of those rules which says, "The water of all rivers and natural streams and of all lakes, natural ponds and other collections of still water within the hill tracts of the Kumaun Division are the property of and subject to the control of the State." It is not clear from this note whether the water of a spring or collection of still water in the assessed measured land of a private owner is also the property of Government. In justice and equity such water should, it would appear, be the property of the owner of the land. This question has not been decided by any court. The rules of 1917 and subsequent rules of 1931 make all disputes regarding water rights cognizable exclusively by the Revenue courts.

No revision lies to the Board of Revenue.

The Board of Revenue have held in Application no. 14 of 1931-32, Dhan Singh *versus* Bhura, that no revision lies to the Board against the order of the Commissioner under the Water Rules of 1917 or 1931. It is submitted that questions of great public importance are sometimes involved in disputes about water rights and the omission of a right of revision to the Board under the Water Rules is merely accidental. The rules should be amended so as to give a right of revision to the Board.

A question arose in Revenue Appeal no. 56 of 1933-34, Bhawan Singh *versus* Bhudra Mani, whether the Water Rules apply only to irrigation channels or to drinking water also, as the Rules mention irrigation channels only. The lower appellate court that of Mr. Browne, I.C.S., Deputy Commissioner, Garhwal, had held that the Water Rules did not apply to drinking water, but Mr. Owen, Commissioner, in appeal reversed the order and held that the Water Rules applied to drinking water also.

Drinking water.

In Dewan Singh *versus* Dhani Ram (page 186) Mr. Owen, Commissioner, has held that disputes regarding the water of spring which does not flow through a channel lies under the Nayabad Rules and not under the Water Rules. This distinction between water of a spring and the same water flowing through a water channel, looks like hair-splitting and only shows the defective nature of the Water Rules.

The Water Rules of 1931 also provide for a right to take a water channel through the measured assessed land of another on payment of compensation to be fixed by court. This is a departure from the former rules. It is doubtful whether a Revenue court has jurisdiction to interfere with the private rights of ownership of the land of any person. The question has not been decided by any court.

The Water Rules are defective.

The Water Rules appear to be very defective in several respects and lead to much unnecessary litigation. As stated above the ordinary law of easements and prescription used to govern all disputes about water rights before 1917. Revenue courts cannot satisfactorily decide private rights of property which are essentially of a civil nature, and no real necessity has been shown for the introduction of the Water Rules. There is another

point as regards jurisdiction. Rule 10 of the Water Rules makes all disputes regarding water rights exclusively cognizable by Revenue courts. If the dispute relates to a right to a water channel passing through the assessed hissedari land of another, or to water in such land, will the suit lie in the Revenue court? It is open to question whether a Revenue court can adjudicate upon private rights of property which under section 9, Civil Procedure Code, are exclusively cognizable by Civil courts.

This conflict of jurisdiction will continue until the Revenue law of Kumaun is codified.

## CHAPTER VIII—Malguzars

### (1) PADHAN

The padhan is the malguzar of the village. Mr. Traill in his Settlement Report of Kamaun of 1823 describes the padhan thus. Traill, Padhan defined.

> "The padhan is the village ministrial officer entrusted with the collection of the Government demand, and with the supervision of the police of his village. He is commonly one of the villagers appointed with the approbation of the other joint sharers and is removable for malversion or at the requisition of the majority of sharers. There is no hereditary right or claim to the situation of padhan but, generally the son succeeds without opposition, unless incapable from youth and want of talent, in which case the sharers are called upon to choose another padhan from among themselves."

Mr. Batten in his Settlement Report of Garhwal of 1839 quotes the above passage from Mr. Traill with approval. But it seems that during the period intervening between Batten's and Beckett's settlements a transformation took place and the padhan succeeded in strengthening his hereditary right of succession. Batten.

Mr. Beckett on page 10 of his Settlement Report of 1865 says: "the office of a padhan is hereditary except in special cases when someone other than the son of the former padhan having been appointed to the duty, that man's possession was not disturbed but it was declared that, on a vacancy occasioning the representative of the old padhan might raise his claim." Beckett.

Mr. Pauw in his Settlement Report of Garhwal of 1893 while quoting the passage from Mr. Traill's report referred to above does not give his own opinion as regards the right of succession to the office of padhan or malguzar as he is now called. But in the memorandum of village customs or halatgaon prepared at that settlement he makes the appointment normally hereditary, and declares that, failing any near relative of the former malguzar, the District Officer might appoint any other co-sharer of the village, whom he thought fit. Pauw.

It would thus appear that between the era of Traill and Batten and of Pauw the principle of election of the padhan by the co-sharers disappeared, and the office became an hereditary appointment vested entirely in the hands of the district officer on this theory of the hereditary rights

minor sons, even widows of former padhans have on a few occasions been appointed malguzars with mukhtars to act for them.

Case law.

The case law on the subject is conflicting, various officers having taken different views. Some have followed the principle of Traill and Batten, viz, that the appointment is of a public nature while others have decided in favour of the hereditary right.

In Miscellenous Revenue Appeal no. 31 of 1922-23, Gyan Singh *versus* Lal Singh, Mr. Wyndham, Commissioner, laid down the principle that in cases where the office of the malguzar has been hereditary and there is land attached to the office the hereditary principle of succession should be followed and in the absence of the son the nearest male relative should be appointed malguzar.

The trend of recent decisions is that in every case the son or brother of the former malguzar is appointed to the office. But in the absence of any such near relative, the appointment is made by the majority of votes of the co-sharers.

The office of malguzar, especially when it is hereditary is much valued and the hereditary principle is in accordance with public sentiment. Hence the present rule seems quite sound.

Dismissal of malguzar.

As regards the dismissal of the malguzar the decisions have been most conflicting. Mr. Stowell in his Manual of Land Tenures, pages 100 and 110, gives the following grounds for the dismissal of the malguzar "(*a*) conviction of an offence in the criminal courts, (*b*) being heavily involved in debt, so as to be practically insolvent or all his share in the village mortgaged, (*c*) having sold his whole share in the village, or (*d*) misconduct or misbehaviour such as persistent neglect and delaying in collection and paying in the revenue, disobedience of orders, failure to check or report forest offences in the village misconduct in respect of his police duties, bad livelihood or vicious habits and the like."

The present tendency of district officers is to treat the malguzar as a mere subordinate official, liable to be dismissed for any disobedience of orders or failure to discharge his duties. It has also been held in several cases that the family of the dismissed malguzar forfeits its claim to the office if the former malguzar has been convicted of a serious offence or been guilty of misconduct or failure to report forest or other offences.

In some cases it seems very hard to punish the whole family for the fault of a single member. I think that except in cases where one member of a family has been convicted for serious political offences or anti-Government activities the other members of the family should be allowed to succeed.

### (2) Ghar Padhan

Stowell: Ghar padhan defined.

"Ghar Padhan is the representative khaikar in a wholly khaikari village. He is to the khaikari community what the padhan is to the hissedari community" (Stowell's Manual of Land Tenures, page 112, paragraph 6).

Batten.

With regard to the ghar padhan Mr. Batten in his Settlement Report, page 525, paragraphs 14 and 15, says:

*Paragraph* 14—"All mauzas having separate inhabitancies were allowed to engage separately with Government mainly on the expression of their wishes to this effect by the majority of the inhabitants."

*Paragraph* 15—"This rule equally applied to the case of non-proprietary communities occupying the land but acknowledging some external superior, that is of the khaikars who could prove that previous to the last settlement they had enjoyed the privilege of having their own village padhan and had been permitted to elect one under the same rules as those made for bhayachari mauzas which they often resemble in all but the name."

Beckett.

As Mr. Stowell remarks in his Manual of Land Tenures, page 113, that the more modern form of ghar padhan, however, originated with Mr. Beckett.

"In Garhwal," Beckett says (Settlement Report, page 102), "when a padhan was non-resident from his being a padhan in several villages I kept such men as padhans for the collection of revenue but nominated a resident khaikar a ghar padhan for the performance of police duties."

He further quotes (on page 113, from Sir Henry Ramsay's Settlement Report of Kumaun) the following: "In some cases, sub-padhans, i.e. ghar padhans were appointed with the object of looking after the asami's rights and collecting the revenue."

Pauw.

Mr. Pauw, Settlement Officer, Garhwal (1893-95), however, appointed the non-resident hissedar as malguzar and one of the resident khaikars as ghar padhan. On page 51 of his Settlement Report, he says, "Owing to the existence of under-proprietary right in this class of villages and the fact that the hissedar, having no cultivation there could not become resident, a special official chosen from among the khaikars with the title of ghar padhan was appointed for the collection of the land revenue rates payment direct to the patwari the hissedari dues alone being paid to the proprietors."

Stowell.

Mr. Stowell in his Manual of Land Tenures, page 114, last paragraph, interprets the position of the ghar padhan correctly in these words, "These men are found only in villages held by the permanent tenants, khaikars, in which the malguzar has no power of interference, the revenue being collected by the ghar padhan from his brother asamis and handed over with the malkana to which the malguzar is entitled by the ghar padhan."

The non-resident malguzar has been constantly trying to break down the privileged position of the ghar padhan and reduce him to the status of a mere mukhtar malguzar. The whole trouble has arisen owing to Mr. Beckett's appointing the non-resident malguzar over the head of the ghar padhan.

Conflicting decisions.

Needless to say this has lead to conflicting decisions by the different Commissioners. Sir Henry Ramsay consistently upheld the independence and authority of the ghar padhan; while Messrs. Ross, Reid and Giles

reduced him to a mukhtar's position. Colonel Grigg upheld his independence, while Mr. Hamilton described him as an "agent appointed by the malguzar for a khaikari village."

But the question has been finally settled by the ruling of Messrs. Hardy and Thompson Members, Board of Revenue, in the case of Hayat Singh who have held in favour of the ghar padhan's independence. In practice also the ghar padhan collects the revenue and pays it either to the malguzar or to the patwari. He enjoys the padhanchari land. His name is recorded in settlement phant as ghar padhan along with the malguzar. He is appointed and dismissed like a malguzar by the Deputy Commissioner according to the rules which apply to the office of a malguzar.

Mr. Stowell in paragraph 4, page 13 of his Manual, says that ghar padhans were sometimes appointed in mixed villages in place of a nominated mukhtar but gives no instance. I think this is incorrect, mukhtar padhans are invariably appointed for mixed or kachcha khaikari villages when the malguzar does not reside in the village. Some villages, however, which were originally pakka khaikari villages, but have been reduced to the status of kachcha khaikari villages by the successive invasions of the hissedar, still retain the office of ghar padhan. Perhaps, Mr. Stowell refers to such villages. In fact the existence of a ghar padhan is a very strong proof of the village having been originally pakka khaikari.

## CHAPTER IX—Mutations

There is only one point which I wish to touch upon under this chapter. The Board of Revenue in Petition no. 16 of 1931-32—Fateh Singh *versus* Balbhadra Singh—seem to hold that a co-sharer whose name has not been recorded in the Revenue papers under section 34(5), Land Revenue Act, cannot apply for partition in the Revenue court. But in S. R. A. no. 27 of 1922, Musammat Ram Sundri *versus* Krishna Tewari, Mr. Wyndham, as High Court Kumaun, in a well-reasoned judgment, held that a non-recorded co-sharer could object under rule 57(4) [present rule 21(4)] of the Kumaun Rules during partition proceedings; and that section 34(5) was not obligatory in Kumaun, as rule 21(4) of the Kumaun Rules is a substitute for section 111 of the United Provinces Land Revenue Act in Kumaun. I think this view is correct. As remarked by Mr. Wyndham, it would be "disastrous" if only recorded co-sharers could object under rule 21(4), Kumaun Rules or apply for partition; as the people are very lax in applying for mutation of names.

## CHAPTER X—Miscellaneous

The two questions which require consideration under this chapter are: (1) leases for non-agricultural (shops) purposes, (2) the user rights of the villagers in partikadim or unassessed measured land of individual co-sharers.

New agricultural leases.

As regards (1) such leases are provided for under rules 42—45 of the Nayabad and Waste Land Rules of Kumaun under notification no. 612/XIV—312(24), dated August 1, 1934.

The only ruling of the Commissioner, Kumaun Division, on the subject which could be traced is M. R. A. no. 163 of 1933-34, dated March 14, 1935, decided by Captain Johnston—Lala Chirangi Lal *versus* Krishana Mistri. The point decided in this ruling was regarding limitation for the cancellation of such leases. On the analogy of suits for setting aside Nayabad grant it was held that limitation for such suits was one year. The issues whether, in such a suit the Secretary of State on whose behalf the lease is granted is a necessary party; and whether the suit is cognizable by Revenue court or Civil court, were not decided in this ruling.

There being no provision for a regular suit under the Nayabad and Waste Land Rules 42—45 for cancellation of a lease, such suit should lie in the Civil court. The Secretary of State being a party to the lease should be impleaded as defendant.

It is also doubtful whether the limitation for such a suit should be the same as for setting aside a Nayabad grant as held in the case cited above.

It is submitted that the limitation for such suits should be three years under Article 91 of the Indian Limitation Act and not one year as expressly prescribed in the case of Nayabad grants in Nayabad Waste Land Rules.

Parti kadim.

As regards (2) there are conflicting rulings on the subject. Mr. Wyndham, Commissioner, Kumaun Division, in a well considered judgment in Misc. Rev. A. no. 37 of 1919-20—Diwan Singh and others *versus* Gulab Singh and others, held that Parti kadim land in Kumaun is not the exclusive property of its recorded co-sharer and the village community can claim rights of user over it; but that such recorded co-sharer has a prior right to cultivate it. In M. R. A. no. 13 of 1919-20—Bishwa Rup and others of village Malla-Palai *versus* Jaman Singh and others of village Talla-Palai, patti Aswalsyun, dated May 10, 1920, it was held that Parti kadim land is similar to benap waste land for purposes of village Gauchar and that even outside villagers can claim rights of user over parti kadim land which is waste. In Civil Appeal no. 82 of 1918, dated August 23, 1918—Madhba Nand and others *versus* Ishwari Datt, Mr. J. M. Clay (now Sir Joseph Clay), District Judge, Garhwal, held that transfers of measured unassessed waste lands were absolutely void. This judgment was affirmed by Mr. Wyndham, Commissioner, as High Court of Kumaun in Second Civil Appeal no. 12 of 1919.

TARA DATT GAIROLA.